

# **SENTENCING CIRCLES IN SASKATCHEWAN**

**A Thesis Submitted to the College of  
Graduate Studies and Research  
In Partial fulfilment of the Requirements  
For the Degree of Master of Laws  
In the College of Law**

**By**

**Bonnie Orchard**

**Saskatoon, Saskatchewan**

**Fall, 1998**

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## **ABSTRACT**

This Thesis attempts to develop an understanding of the problems that Aboriginal offenders encounter in the Canadian justice system and examines why Euro-Canadian justice philosophy and mechanisms are not appropriate or effective. It is often very difficult for non-Aboriginal persons to understand that there is a difference between being Aboriginal and non-Aboriginal. This difference impacts offenders as they interact with the criminal justice system.

The sentencing circle is one process by which the sentencing judge can obtain a clearer picture of the offender and consider sentencing options other than the 'usual punishment'. It is an opportunity for the offender to address the consequences of his or her actions and to seek the help of community and family. It is also an opportunity for the victim to be heard and to seek redress.

Current sentencing practices and theory are briefly examined as they bear on sentencing circles. Issues which have arisen as a result of the implementation of sentencing circles in Saskatchewan are examined (where possible, within the context of Saskatchewan case law).

The use of sentencing circles has raised questions about the current approach to sentencing as contrasted with the restorative approach of the circle. The restorative approach to justice is a recurring theme throughout the Thesis.

The different approach of the sentencing circle to the offender and the involvement of the community in the sentencing process have raised questions about incarcerating offenders, about disparity in sentences, about the protection of the public, and about the role of the community, the family and victims in the sentencing and rehabilitative processes. These issues are examined.

This Thesis has also attempted to draw some conclusions about the larger issue of where sentencing circles may be leading the justice system and the Canadian public. Is the sentencing circle merely an innovation within the justice system that can provide a more effective sentencing mechanism than the sentencing hearing? Or, is the sentencing circle leading Aboriginal peoples towards their own justice systems?

The sentencing circle has forced an examination of current sentencing practices. This, in turn, has opened a window of opportunity to do some serious re-evaluation of the existing sentencing process.



## **ACKNOWLEDGEMENTS**

I wish to acknowledge with gratitude the financial assistance of the Law Society of Saskatchewan through the Culliton Scholarship, and the College of Law, University of Saskatchewan, through a Graduate Student Scholarship.

I also wish to thank my Thesis Supervisor, Professor Tim Quigley, for his assistance, patience, good humour and sound advice throughout my post graduate studies and Thesis preparation.

Thank you as well to Professor Ken Norman, Head of the Graduate Studies Committee of the College of Law for his encouragement, assistance and, again, patience.

I thank my Thesis Committee of Professors Norman Zlotkin, James Youngblood Henderson and Tim Quigley, and my External Examiner, Professor Chris Levy, for their assistance.

I particularly wish to thank Professor James Youngblood Henderson for his time and understanding and for allowing me to share in his seminars in the College of Law.

When I began my graduate program, I knew very little about Aboriginal cultures, and about political and legal issues. That is why I chose to work in this area of the law. It has been a fascinating journey of self-discovery and of

exploring cultures about which I previously knew very little. I want to thank those people who assisted me along the way, and particularly, those who shared their thoughts with me and those who allowed me to visit various communities and observe their sentencing circles, seminars, conferences and other cultural and learning experiences.

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## **CHAPTER ONE**

### **AN INTRODUCTION TO THE SENTENCING CIRCLE AND TO PROBLEMS IN THE EXISTING JUSTICE SYSTEM**

#### **1.1 INTRODUCTION**

The criminal justice system has its greatest impact upon offenders at the sentencing stage of the judicial proceedings. An offender reaches sentencing in one of two ways: following conviction after a trial or as a result of a plea of guilty. The sentencing hearing is the process by which an appropriate sanction for offensive conduct is determined. In considering what is appropriate, the judge is to consider the often competing interests of the public, the offender, the victim of the crime, and justice personnel.

Unfortunately, it seems that the sentencing process is not producing appropriate, effective and satisfying results. If there is any leniency or innovation in the sentence, the victim, the public and various justice personnel are unhappy. If, however, demands for harsh sentences are met, little or nothing is done to assist the offender in rehabilitation, and usually, the victim in recovery and restoration to pre-offence status.

With a view to reconciling the competing interests of the public, the offender, the victim and justice personnel, various innovations in the sentencing process are being studied and used on an experimental basis. There are also new approaches

to resolving conflict such as diversion projects which divert offenders away from the courts and deal with the offence in an alternate manner (e.g. victim and offender mediation).<sup>1</sup>

There are also community justice projects which are processes within the existing justice system. These often focus on the involvement of the community, the victim and the offender in the sentencing process. Sentencing panels (selected local residents who sit with the judge at sentencing) and sentencing circles are examples of community justice projects.

This Thesis examines the use of the sentencing circle in Saskatchewan. A sentencing circle (also referred to as circle sentencing) is a judicially recognized alternative to the usual sentencing hearing.<sup>2</sup> A sentencing hearing is usually short and often follows immediately upon a conviction at trial or a guilty plea. The usual participants in a sentencing hearing are Crown and defence counsel, the judge, sometimes a probation officer or other witnesses, and, infrequently, the offender (the offender is normally present, but usually does not participate). Sometimes a victim impact statement is read.

In contrast, a sentencing circle requires extensive preparation time and is held at a date agreed upon by the parties. A circle usually takes much more time than a sentencing hearing. Rather than focussing on the guilt of the offender, the sentencing circle is focussed on the offender and the victim and on the causes and impact of the offence. It examines the effect of the offence upon the victim and the community, and tries to determine what can be done to help the offender and the victim. The sentencing circle involves a wider spectrum of participants including the

offender and the victim, their families and representatives from their communities. Discussions are wide ranging and will usually lead to a recommendation to the sentencing judge for an innovative sentencing plan.

The adversarial roles of the Crown and defence counsel and the limited roles of the offender and the victim are usually set aside at a circle. The sentencing circle looks less to the offence and the 'usual' punishment (as prescribed for similar offences and offenders), and more to 'putting things right'. It gives the victim an opportunity to confront the offender and to seek compensation or redress. The rehabilitation of the offender, the healing<sup>3</sup> of the victim and the restoration of good relations between the offender and the community, and also between the offender and the victim (and their families) are central issues in a sentencing circle.

The sentencing circle is a dramatic change in the justice system which raises the question of why it has been introduced. This Chapter will examine the failure of the existing justice system to meet the needs of Aboriginal peoples. It will briefly examine the over-representation of Aboriginal peoples as offenders in the justice system and in prisons. It will examine the role of systemic discrimination and the role of discretion exercised by justice officials.

This Chapter also deals with some of the differences between Aboriginal and Euro-Canadian cultures, traditions, rules of behaviour, concepts of justice, and means of dispute resolution. The Euro-Canadian way of looking at life (world view) is very different from, and can even be completely opposite to that of Aboriginal peoples. The role that this difference plays in the justice system and how it affects Aboriginal peoples must be understood.<sup>4</sup>



## **1.2 THE DIVERSITY OF ABORIGINAL PEOPLES AND THE NEED TO GENERALIZE CONCEPTS**

There is great diversity among Aboriginal peoples.<sup>5</sup> There is diversity of language, cultures and location across Canada.<sup>6</sup> Government policies and legislation have created an artificial diversity of status, membership, bands, communities, and band councils. There are First Nations, Métis and Inuit peoples. There are status and non-status Indians, treaty and non-treaty Indians. Aboriginal peoples are found in urban, rural, reserve and off-reserve settings. There is great variance in economic, social, political and cultural conditions among and within Aboriginal communities. Traditions, customary laws and social norms vary in different communities. The needs and community structures of urban and rural, and reserve and off-reserve peoples differ.

Despite this diversity, Aboriginal peoples tend to share similar world views, concepts of justice, mechanisms of dispute resolution, and cultural and ethical considerations.<sup>7</sup> It is necessary, for the discussion in this Thesis, to generalize about Aboriginal and Euro-Canadian perspectives in order to understand the differences between them.

However, this generalized approach must be kept in perspective. What may be generally true for Aboriginal peoples may not be true in a specific nation or community. No single solution to any problem is going to work for all Aboriginal peoples and communities given their great diversity. What will work for an economically prosperous and culturally stable reserve will not necessarily work in an urban centre, nor in an impoverished, remote reserve overcome by substance

abuse, unemployment and family violence. Accordingly, it must be recognized that an innovation such as the sentencing circle may be effective in one community and not in another.

### **1.3 OVER-REPRESENTATION OF ABORIGINAL PEOPLES IN THE JUSTICE SYSTEM**

It has become trite to say that the Euro-Canadian justice system has failed the Aboriginal peoples of Canada.<sup>8</sup> Aboriginal peoples experience disproportionate contact and are subject to differential treatment by the justice and penal systems.<sup>9</sup> They are over-represented as offenders within the system. Yet, at the same time, they are under-represented as authority figures such as lawyers, judges, police officers, and prison, parole and court officials.<sup>10</sup> They are more likely than non-Aboriginal persons to commit certain types of crimes and those crimes are more likely to be detected. Aboriginal peoples are more likely to be investigated or arrested for a crime and are more likely to plead guilty. They are more likely to be charged with multiple offences, incarcerated, and denied access to bail, parole, and alternative programs. They spend more time in pre-trial detention and less time with their lawyers.<sup>11</sup>

In Saskatchewan, in 1995-6, Aboriginal peoples constituted approximately 11.4 per cent of the population, but accounted for approximately 72 per cent of federal and provincial correctional admissions.<sup>12</sup> Even more startling is that the problem of disproportionate representation of Aboriginal peoples within the justice system is growing in Saskatchewan.<sup>13</sup> When this fact is coupled with the higher

birth rate of Aboriginal peoples, over-representation can be seen as an increasingly serious issue.<sup>14</sup>

The causes of the over-representation of Aboriginal peoples in the Canadian justice system are varied.<sup>15</sup> The Royal Commission on Aboriginal Peoples [hereinafter RCAP] stated that "economic and social deprivation is a major underlying cause of disproportionately high rates of criminality among Aboriginal people."<sup>16</sup> The Manitoba Aboriginal Justice Inquiry [hereinafter AJI] acknowledged a higher crime rate among Aboriginal peoples, but stated that it did not believe that "there is anything about Aboriginal people or their culture that predisposes them to criminal behaviour."<sup>17</sup> It cited over-policing and systemic discrimination as large factors in the higher crime rate.<sup>18</sup>

AJI also acknowledged that higher crime rates result from "despair, dependence, anger, frustration and sense of injustice prevalent in Aboriginal communities" which stem from a century of cultural and community breakdown.<sup>19</sup> The suppression of Aboriginal peoples by European nations, by Canadian governments, and by various churches was directed at the destruction of Aboriginal cultures and the assimilation of Aboriginal peoples into Euro-Canadian society. As Aboriginal peoples were dispossessed of their lands, their traditional ways of life and their means of social control, they fell into social disorder.<sup>20</sup> Aboriginal peoples and the justice system are beginning to recognize that the loss of Aboriginal traditions and cultures plays a part in over-representation in the

criminal justice system. The Prince Albert Grand Council stated:

Elders have at times expressed the view that First Nations people who are in conflict with the law are usually in conflict with their cultural and spiritual values and traditions, that they have lost their culture and a sense of who they are as people.

The current system is not effective in involving the community nor in resolving the problems that bring these individuals in conflict with the law. This is evident in the high rate of recidivism. Correctional centres, as they exist within the justice system, are simply not conducive environments where First Nations culture and spirituality can be learned and re-acquired.<sup>21</sup>

#### **1.4 SYSTEMIC DISCRIMINATION**

Systemic discrimination plays a major role in the over-incarceration of Aboriginal peoples and in the treatment they receive within the justice system.<sup>22</sup> Systemic discrimination occurs (often unintentionally) because Euro-Canadian rules, norms and standards are built into the justice system and are not appropriate for Aboriginal peoples. The application of these standards may have consequences for Aboriginal offenders which are different from, and often worse, than those experienced by their Euro-Canadians counter-parts.<sup>23</sup> For example, the incarceration of offenders who do not pay fines disproportionately affects Aboriginal people because of their lower economic status. Similarly, a cash bail or property surety requirement may preclude many Aboriginal offenders from obtaining pre-trial release. The use of English or French as the language of the courts and of prison, parole, probation and other services can create very real disadvantages in the absence of adequate translation facilities. An Aboriginal offender, when viewed by a non-Aboriginal decision-maker (whether police officer,

judge, lawyer or other justice official), from a Euro-Canadian perspective and compared with the standards and norms of that culture, may not receive fair treatment.<sup>24</sup> The importance of 'education', 'employment', a 'good home', a 'stable' family and marital situation, and an individual's 'community standing' or 'good works' reflect Euro-Canadian perspectives. Definitions of these terms are discriminatory if viewed only from Euro-Canadian perspectives and standards. Yet it is this perspective which is taken into account throughout the justice system.

Discrimination is a factor in the discretionary decisions made at all levels of the justice system.<sup>25</sup> The police have discretion in matters of arrest, investigation, and charging. They may 'over-police' an Aboriginal community, presupposing that there will be crime. Prosecutors have discretion in the type and number of charges laid and proceeded with, in plea bargaining, in the choice of summary or indictable proceedings, in evidentiary matters, and in submissions made at sentencing and bail hearings.<sup>26</sup> Judges have discretion in the conduct of the court proceedings, in bail and sentencing, and in the evidence received in court. Probation officers, parole officers, prison officials, lawyers, and legal aid personnel all make discretionary decisions which can be discriminatory if based upon Euro-Canadian perspectives or values.

## **1.5 ABORIGINAL AND EURO-CANADIAN PERSPECTIVES**

Perspectives on justice issues are influenced by the way a people think and view life. This 'world view' is a reflection of the culture and background of a particular person or group of persons.<sup>27</sup> Non-Aboriginal peoples distinguish among

religion, medicine, nature, science and politics. In contrast, Aboriginal peoples have a holistic world view. All life and all activities are viewed as interrelated and not as isolated and separate. Time, seasons, and life are circular, repeating patterns.<sup>28</sup> The 'circle' is a significant concept in the lives of Aboriginal peoples:

The significance of the circle in Aboriginal communities is not to be understated. For Aboriginals, the circle symbolized all essences in the cycles of life and death. It is found in physical manifestations of the sun and the moon and in the natural cycles of birth, life, death, seasons, the directions and virtually all cycles of our ecosystem. Aboriginal existence and philosophy are from the perspective of one species in relation to an entire universe, never placing humans at the centre, above or below anything else in the universe. Instead there is a recognition and respect for the interdependence among all life forms.<sup>29</sup>

In contrast, Euro-Canadian thought is generally linear: one cannot return to the past and the future lies ahead. The various aspects of life are distinct and are to be controlled. Humans are superior to nature. They can control nature and their own destinies.

The two world views are very significantly different. The AJI acknowledged the impact of this difference:

The difference between these two world views account, in large part, for the differences in the philosophy, purposes and practices of legal and justice systems. Each world view is the basis for the customs, manners and behaviour that are considered culturally appropriate. One's individual or cultural understanding of humanity's place in creation, and the appropriate behaviour that understanding dictates, pervade and shape all aspects of life.<sup>30</sup>

## **1.6 CULTURAL ETHICS**

The concept of 'ethics' is important to the understanding of Aboriginal concepts of justice and approaches to dispute resolution.<sup>31</sup> A cultural ethic (or rule

of behaviour) is an ingrained behavioural quality or characteristic which is prevalent within an identifiable group of people.<sup>32</sup> Ross states that Aboriginal peoples may have ethical considerations which lead them to act or react differently from what would be expected from non-Aboriginal people in a given situation. He argues that we have to see the conduct and reactions of Aboriginal peoples through their cultural perspectives and to realize that Aboriginal peoples may not conform to our standards of behaviour because of profound cultural differences.<sup>33</sup>

Culturally appropriate behaviour for an Aboriginal person may be the opposite behaviour from what is expected by Euro-Canadian justice personnel. For example, European cultures often regard strong eye contact as indicating sincerity, respect, and a straight forward attitude. Failure to establish or maintain eye contact can be interpreted as an indication of lying or evasiveness. However, in some Aboriginal cultures, eye contact is regarded as a deliberate sign of disrespect.<sup>34</sup>

If this is true, it may not be appropriate to make decisions according to Euro-Canadian standards of behaviour. A justice official may assume that the conduct of an Aboriginal accused or witness shows a lack of co-operation, caring or remorse when in fact the opposite may be true. (It is important, however, to remember that not all Aboriginal peoples share all of the ethics discussed herein. Some may adhere to the traditional ethics and world view of their culture while others may have lost these due to acculturation. Not all ethics are part of all cultures. However, cultural ethics are very significant for many Aboriginal peoples and may affect their interaction with the justice system).

An important ethic of Aboriginal peoples is the concept of non-interference

in the lives of others. An individual should not interfere with the various life choices that others make, nor criticize or punish another person. This ethic of non-interference extends to members of one's own family and may make discipline and structure for children inappropriate. What may be seen by a non-Aboriginal social worker as neglectful parenting, may be a parent allowing children to make their own decisions, without interference, in accordance with traditional practices.<sup>35</sup> An Aboriginal victim may not testify in court against an offender, or may be an evasive witness because it may be contrary to appropriate behaviour and beliefs to publicly criticize another person. Whereas the Euro-Canadian system condemns the actions of the offender, and labels conduct as wrong, inappropriate, or inadequate, it may be rude or wrong for an Aboriginal person to condemn or criticize.<sup>36</sup>

There is no concept of guilt in Aboriginal traditions<sup>37</sup> and no adversarial process to determine the guilt of a party. The truth is vitally important to Aboriginal peoples.<sup>38</sup> It is imperative that a person admit his or her conduct (i.e. tell the truth). This is essential to the process of resolving conflict and restoring harmony within the community or kin group. As a result, an Aboriginal accused may feel obliged to plead guilty in court to admit the conduct, not understanding the Euro-Canadian concept of guilt and the requirement that the Crown prove its case.<sup>39</sup> In Aboriginal traditions there may be many truths to a situation. The truth of the person who was hit is not the same as the truth of the person who inflicted the blow. Each person tells the truth as he or she knows it and is not to dispute another's person's viewpoint.<sup>40</sup>

Aboriginal people may feel that is wrong to act in a manner superior to



another person or to make another person feel inadequate.<sup>41</sup> In the Euro-Canadian judicial hierarchy, the judge is superior to the lawyers, the lawyers are superior to the witnesses and accused, and the public is kept at a distance from the proceedings. This may be intimidating for Aboriginal accused or witnesses.

The Euro-Canadian justice system looks to a show of remorse on the part of an offender, particularly at the sentencing stage. However, it may not be appropriate for an Aboriginal person to show emotions, particularly anger, sorrow, or hostility. What may be seen as an inappropriate, uncooperative, and unremorseful attitude of an Aboriginal offender or witness, may be the proper conduct for that person within the cultural context.<sup>42</sup> Aboriginal cultures may have repressed such feelings and displays of emotion because such emotions could endanger the community welfare by causing dissension among the members when the co-operation of the community was required to survive.<sup>43</sup> (However, at a sentencing circle, the community often looks to the offender for remorse as will be discussed in Chapter Three<sup>44</sup>).

Traditionally, achievements were not to be praised or rewarded and gratitude was not to be shown. Rather, persons who had done well might be asked to continue their roles in the community.<sup>45</sup> Information which could be seen as praise might not be offered to the court by an Aboriginal person because it would be inappropriate and embarrassing to do so. As a result, the court may not hear important information about an Aboriginal accused, particularly at the sentencing hearing. This information may have been significant in determining a sentence.<sup>46</sup>

The traditional reaction to stress for an Aboriginal person might be to slow

down, to assess the situation and conserve physical and mental energy. Euro-Canadians expect a different response from a witness or an offender. In the courtroom, in a pre-sentence interview or in a psychological assessment, this cultural difference might display itself to the non-Aboriginal observer to be a lack of co-operation, withdrawal, or a disrespectful, uncaring attitude.<sup>47</sup>

The timing of dispute resolution was important in Aboriginal communities. Matters of conflict were to be dealt with quickly and the emotions involved were to be forgotten as quickly as possible. This was necessary so that the community could continue the co-operative effort necessary to survive.<sup>48</sup> For some Aboriginal people, the time must be right; everything must come together for a successful outcome of a venture.<sup>49</sup> This perspective on timing may not fit into the court system with its schedules, time constraints, and lengthy delays. There is no consideration that it might not be the appropriate time for an Aboriginal offender to deal with an issue.

There is growing recognition in Canada of these vast differences in Aboriginal and Euro-Canadian perspectives and that the effect of these differences can be damaging:

Judges and juries can hardly be impartial when they misinterpret the words, demeanour and body language of individuals. Witnesses who refuse to testify, and people accused of crimes who refuse to plead and who show no emotion, *are judged differently from those who react in ways expected by the system. Their culturally induced responses are misunderstood, sometimes as contempt, and may result in an unfair or inappropriate hearing and in inappropriate sentencing.* To require people to act in ways contrary to their most basic beliefs and their ingrained rules of behaviour not only is an infringement of their rights-it is a deeply discriminatory act (emphasis added).<sup>50</sup>

## 1.7 ABORIGINAL AND EURO-CANADIAN JUSTICE CONCEPTS

Prior to European contact, indigenous peoples had stable cultures with various forms of governance and 'legal systems'. These systems included codes of conduct (i.e. laws), methods of dispute resolution, and enforcement mechanisms.<sup>51</sup> Although these legal systems may not have conformed to European ideals, they provided order and coherency to indigenous societies.<sup>52</sup> The mere fact of their difference from European structures did not make them less valid or functional. However, Euro-centric attitudes towards difference (i.e. things that were not as Europeans thought they should be) did not allow for the recognition and continuance of Aboriginal legal systems:

Cultural blindness has not only limited western understanding of Aboriginal justice systems; the mischaracterization of those systems as 'uncivilized' has provided a moral justification for imposing western concepts of law and justice in ever-widening geographical and conceptual arcs.<sup>53</sup>

Aboriginal and Euro-Canadian concepts of 'justice' and 'law' are different. However, both systems strive to control and deter deviant behaviour in order to protect the community.<sup>54</sup> In general, the Aboriginal view of law is less about negative rules of behaviour (i.e. what not to do and what punishment there will be) and is more about "the right way to live."<sup>55</sup> It is about rules to govern daily life through traditional values and the community's culture. Within Aboriginal nations and communities, although there are varying concepts of the Euro-Canadian terms 'justice' and 'law', a common theme is that "justice is about life and about organizing our relationships within life."<sup>56</sup> Justice is also about the community and harmony. It is about "restoring peace and equilibrium to the community through

reconciling the accused with his or her own conscience and with the individual or family that is wronged."<sup>57</sup> It is about "the way to live most nicely together."<sup>58</sup>

Traditional Aboriginal 'common law'<sup>59</sup> dealt with issues addressed by today's Euro-Canadian courts, such as offences against persons and property. It also dealt with issues of membership, adoption, marriage, family relations and the conservation and management of natural resources. Law included the dignity of offenders and their re-introduction to themselves, their families and communities. It involved apology, compensation, education, crime prevention, individual and family counselling and rehabilitation.<sup>60</sup> Not all sanctions imposed in accordance with customary laws of Aboriginal peoples are restorative.<sup>61</sup> Beatings, death, ostracism and banishment were sanctions used by various communities.

The Canadian justice system is based on concepts of guilt and innocence, individual rights, intervention and punishment by the state, adversarial fact determination, and the notion that there will be conflict in society. An offence is viewed as a crime against the state, and focuses on the general concept of peace and order in the public domain based on a community of strangers, not on individual relationships within a community. The Euro-Canadian system deprives people of the opportunity to settle their own disputes. A dispute becomes the state versus the accused. The rights of individuals are pitted against the state's resources and coercive power. The victim and the community have little participation in the matter.<sup>62</sup> The system is adversarial: it is win or lose. There is no search for a solution to the conflict which will benefit both the offender and victim.

Generally speaking, the Canadian justice system is vertical. Power is

concentrated in the hands of a few members of the justice system, and there is a distinct and powerful hierarchy, and a myriad of specialists who deal with small, distinct areas of justice.<sup>63</sup> The judiciary is based on the concept of 'independence' from any political or other influence. The decision-makers are to be objective, neutral and impartial. Courts impose their power and will on the people. The state relies on punishment, coercion and force. Canadian law is codified. The system processes cases from investigation to sentence but takes no further interest in the individual once the sentence has been completed (unless there is an appeal). Punishment is used as a means of enforcing conformity to rules and to protect the public.<sup>64</sup> Euro-Canadian criminal law places great importance on the issue of the intent of the offender.

Aboriginal law is a horizontal system.<sup>65</sup> It is based on the oral traditions and the cultures of Aboriginal peoples.<sup>66</sup> Historically, it involved the participation and the consent of the community members in resolving conflicts, not in state intervention and imposed solutions. Dispute resolution focused on community harmony, not on the rights of individuals. The key to survival was co-operation within the community. Conflict within the community (be it the family group, the hunting band, the tribe, or the nation), could disrupt the communal effort required for survival. Personal and community survival required full co-operation and contribution by all persons. Community welfare and survival were put above individual rights or interpersonal disputes.

Decision-making authority was often dispersed among members of the community. There was a consensual nature to decision-making and dispute

resolution. Decision-makers or counsellors were members of the community who knew the individuals and families involved and might use that information to assist dispute resolution. The same persons who assisted in dispute resolution might also dispense punishment on behalf of the community.

The circle in many Aboriginal traditions was used as the forum for community discussions and decision-making. It was also used to facilitate the healing of individuals who had personal difficulties or who had come into conflict with members of their families or the community.<sup>67</sup>

Each community had its own notion of good order. It could mean something very different for a small Inuit family group seeking to survive, than it would for sedentary west coast nations. Kinship was the key to the community structure and responsibilities. Some communities might not have the need for extensive dispute resolution processes outside the kinship group because of limited contact with other groups.<sup>68</sup> In larger, more sedentary tribes and nations, more elaborate codes of conduct and dispute resolution processes would be developed to meet the needs of that particular community. In many Aboriginal communities, public ridicule, teasing and shame were used as deterrents and punishment for wrongful behaviour.<sup>69</sup> The matter of the intent of an offender as conceptualized in Euro-Canadian practices is approached differently from one Aboriginal perspective:

The Ojibwa system does not place any value on the individual wrong-doer's intent or purpose. If an assumption is to be made, it will be assumed that the person does not understand the way in which he or she is expected to behave.<sup>70</sup>

## 1.8 ABORIGINAL CULTURES AND ELDERS

An important aspect of Aboriginal cultures is the role of the older generation, the Elders. In Euro-Canadian society, senior citizens are generally regarded as being at the end of their life's work and productivity. In contrast, in traditional Aboriginal communities, Elders are highly respected. They are the guardians of culture and history and have wisdom and life experiences which can benefit the community.<sup>71</sup>

Not every older person is an Elder. It is a position of respect and recognition conferred upon those the community looks to for guidance. Elders are both men and women, and have different 'gifts'. Individuals seeking spiritual assistance will choose an Elder on the basis of their needs and of an Elder's gift. The assistance of an Elder is essential for spiritual development.<sup>72</sup> As will be seen in Chapter Three, Elders are important members of sentencing circles and often play key roles in rehabilitation plans.<sup>73</sup>

Elders help offenders find their place in their communities, within the context of their history and culture. They help them identify their strengths and direct change in their conduct. They help them understand and follow a spiritual path and realize their value to their community.<sup>74</sup> Although the role of the Elder has been lost in some communities, it is still very important in many. There are many projects and community and individual initiatives to restore the role of Elders.

It must, however, be acknowledged that Elders may not be respected in some communities by young people (as often happens in other societies). They may not hold the same values as all members of their communities. For example,

there may be a greater tolerance of violence against women amongst the older generation. It may be necessary to balance the values of Elders with those of younger groups, and women and victims. There are also concerns that Elders may have been victims of abuse themselves and should address their own issues before becoming decision makers or role models for others in their communities.<sup>75</sup>

Elders are not judges in the Euro-Canadian sense. The concept of judging another person is alien to Aboriginal cultures:

Elders are respected because of their knowledge, commitment and wisdom. They are not simply educated, they are proven wise. Elders do not 'judge'. They see the whole person and find ways (through stories, meditations, prayers, and ceremonies) of helping an individual understand the shortcomings or problems that led to anti-social acts. They focus on harmony, rehabilitation, reintegration of an offender into the family, clan and community-not on guilt. They do not so much care whether an accused was at a certain place at a certain time. They want to know about the balance in their life and the fulfilment of individual responsibilities to others.<sup>76</sup>

It has been recognized that an acceptance and understanding of Aboriginal spirituality and the guidance of Elders provides a potential for change in Aboriginal offenders and prisoners which might not be found in non-Aboriginal programs of rehabilitation and reform.<sup>77</sup> In the prison setting, Aboriginal spirituality "provides native prisoners not only with constructive links to each other but also to their relations with native people outside of prison and with their collective heritage."<sup>78</sup>

## **1.9 BORROWING AND REVIVING ABORIGINAL TRADITIONS**

Colonial governments and the Canadian justice system have had little tolerance or recognition of Aboriginal customary laws and practices and have



regarded them as inferior.<sup>79</sup> Today, however, the validity and effectiveness of some Aboriginal practices are being acknowledged and adapted to the existing justice system. The restorative justice movement, sentencing circles, family group conferences<sup>80</sup> and victim/offender mediation are examples of this 'borrowing' from Aboriginal cultures.

Today many Aboriginal communities are developing approaches to justice problems which reflect their contemporary needs and values, while restoring traditional aspects of their cultures, such as the role of Elders, customary law and traditional forms of dispute resolution. This process is not an attempt to return to pre-contact times.<sup>81</sup> The revival of traditional knowledge and institutions is a means to empower and rebuild communities within contemporary realities and to provide an alternative to Euro-Canadian structures.<sup>82</sup>

However, this process is sometimes criticized as 'creating tradition', rather than reviving traditional structures.<sup>83</sup> Justice initiatives and community innovations may be based only to some degree on traditions or they may be borrowed from different Aboriginal cultures. The use of the sentencing circle for a non-Aboriginal offender<sup>84</sup> or in Inuit communities (which have no connection to circle healing and decision-making) are examples of adapting and borrowing from another culture or community.

Concerns can arise from within Aboriginal communities about the revival of traditional forms of dispute resolution or about the recognition of Aboriginal control over justice. There may be fears about new power structures and internal power struggles for control of new institutions or areas of jurisdiction. It is important that

there be consensus in the community for the revival of traditional processes. A traditional structure will be of no benefit if it is not accepted by the members of the community. All groups and interests within the community must be consulted and their interests and concerns identified and respected. There are many groups within Aboriginal communities which feel that they are being left out of current political decisions.<sup>85</sup> Women's concerns in particular must be addressed. These are issues which must be dealt with if sentencing circles are to be used in a community.

#### **1.10 REFORM OF THE JUSTICE SYSTEM**

Three themes have arisen out of the myriad of proposals, pilot projects, commissions, inquiries and conferences about Aboriginal justice issues.<sup>86</sup> The first theme is the reality of Aboriginal over-representation in the justice system. The second is the existence, at all levels of the justice system, of discrimination against Aboriginal peoples (particularly systemic discrimination). The third is the perception among Aboriginal peoples that the justice system is foreign to them and has been imposed upon them.<sup>87</sup>

The existing justice system does not treat Aboriginal peoples fairly or equitably and it does not deliver appropriate or meaningful justice services. AJI stated that it is wrong to assume that Aboriginal peoples will learn to accept and conform to the existing justice system. Quite simply, the system will never work for Aboriginal peoples.<sup>88</sup> Changes to the system, such as using Aboriginal personnel or having local projects, do not deal with the social problems of Aboriginal peoples.

Sentencing circles are a reform within the existing justice system. In Canada, there have been generally two main approaches in dealing with reform of the justice system. The first approach has been to 'Aboriginalize' or 'Indigenize' the system by increasing the representation of Aboriginal peoples at all levels of the justice system and by encouraging cross-cultural training for non-Aboriginal justice workers. The purpose is to make the criminal justice system "more hospitable to Aboriginal people"<sup>89</sup> and to reduce feelings of alienation. This approach does not change the existing justice system or the manner in which Aboriginal peoples interact with it. As stated by RCAP:

Philosophically, these programs start from the premise that all people living in Canada should be subject to the same justice system, but that special measures may have to be taken to make that system understandable and comfortable to Aboriginal people who come to it from a different perspective.<sup>90</sup>

The second approach to reform has been to create Aboriginal projects and models (such as sentencing circles) within the existing system. Part of this approach is to increase community involvement in the justice system through community advisory groups, community crime prevention, sentencing circles, sentencing panels, alternate dispute resolution, diversion projects, Aboriginal spirituality facilities, and community-based sentences.<sup>91</sup>

Although there have been many initiatives in both of these areas, neither adding Aboriginal personnel nor having isolated projects has resulted in significant changes for Aboriginal peoples. Of the two approaches, the majority of government funds have been spent on Aboriginalizing the system rather than on Aboriginal justice projects.<sup>92</sup> Both of these strategies of 'tinkering' with the system are aimed

at making the existing system more effective: they do not deal with underlying problems.<sup>93</sup> Both of these approaches are reforms within the existing system. They are not directed towards the development of Aboriginal justice systems. However, as will be examined in Chapter Four, the sentencing circle, although it is a justice project aimed at reforming the existing justice system, may be a stepping stone to Aboriginal justice systems.<sup>94</sup>

The establishment of Aboriginal justice systems is another alternative for change.<sup>95</sup> There is, however, great resistance to this option (as there is with other proposals for reform). The reasons for resistance to Aboriginal justice systems and to reform in general are varied. A large number of people in the existing justice system have a vested interest in maintaining the status quo, their jobs and existing power structures. There are other reasons for the resistance to change, ranging from fiscal restraints, rigidity of governments, and public misperceptions of the issues and historic realities:

Aboriginal justice reform has been moving very slowly, despite all the major studies, much talk and a fair amount of goodwill. There has been considerable political and bureaucratic resistance to change encountered by Aboriginal governments. There (are) a number of reasons for this. First, there has been a failure to understand the aspirations of Aboriginal Peoples and to appreciate the legitimacy of their inherent right to self-government. Second, there is a reluctance, natural to human beings, to give up power and control. Third, there is a fear that transferring or sharing justice responsibilities with Aboriginal governments could result in a deterioration of justice services. Fourth, there is the question of the expense of funding the proposed changes at a time when there are severe restraints on government spending. And fifth, there is government inertia.<sup>96</sup>

The actual cost of large scale reform is unknown. Lack of funding for reform is a great problem which needs to be addressed jointly by federal and provincial

governments.<sup>97</sup> There is, however, the view that reform will result in lower rates of incarceration for Aboriginal peoples and that the money thus freed up could be used in the communities to alleviate the conditions which lead to conflict with the law. The issue of a potential cost savings is not lost on both federal and provincial levels of government but has not yet led to significant change.<sup>98</sup>

However, there is increasing recognition that Aboriginal justice systems may be the way of the future. RCAP stated that, with or without government approval, Aboriginal communities across Canada are starting their own justice systems.<sup>99</sup> This perspective must be remembered when considering the present and future role of the sentencing circle in the justice system.

## **1.11 CONCLUSION**

This very brief and general introduction to the problems encountered by Aboriginal peoples within the justice system and to the great differences between Euro-Canadian and Aboriginal approaches and understandings of justice issues is important to the discussion of the issues arising from the use of sentencing circles. The key fact to remember is that Euro-Canadian traditions, cultures, values and perspectives are different from those of Aboriginal peoples and that both are equally valid in Canadian society.

## ENDNOTES

1. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide-A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) [hereinafter RCAP: *Bridging*] at 104 where it was stated that diversion programs are alternatives to the judicial process. The offender usually accepts responsibility for the offence. There is no determination of guilt or innocence, and therefore, the offender has no criminal record for the particular offence.
2. Sentencing circles have taken place in many jurisdictions throughout Canada with the consent of the presiding judge. The Saskatchewan Court of Appeal in *R. v. Morin*, [1995] 9 W.W.R. 696 (Sask. C.A.) at 700 stated: "There is no contest over the use of sentencing circles; their use in this province is now well established."
3. The term 'healing' is used broadly throughout the literature and in the process and development of sentencing circles. There are two focuses of healing in the sentencing circle: the healing of the individuals and the healing of the community. For a discussion of healing in the community context see Marcia B. Krawll, *Understanding the Role of Healing in Aboriginal Communities* (Supply and Services Canada: Aboriginal Peoples Collection, Corrections Branch, Solicitor General Canada, July 1994).
4. For a discussion of the differences in values and cultures of Aboriginal and non-Aboriginal peoples and the resulting conflict, see James Dumont, "Justice and Aboriginal People", *RCAP, Aboriginal Peoples and the Justice System* (Report of the National Round Table on Aboriginal Justice Issues, Ottawa: Canada Communication Group, 1993) 42 at 61 [hereinafter RCAP Round Table].
5. It is important to acknowledge that Aboriginal peoples are not a monolithic group: James "Sta'miksi'na" Oka, "Criminal Systems of Justice In Canada: Toward Aboriginal Alternatives" (paper prepared for Care and Custody of Aboriginal Offenders Conference, Corrections Canada, Prince Albert, 15-7 Feb. 1995) at 2.
6. There are 52 Aboriginal languages, over 2,000 Aboriginal communities and 566 Indian bands: Teresa Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter", RCAP Round Table, *supra* note 4, 359 at 374.

7. RCAP: *Bridging*, *supra* note 1 at 3 (quoting from the brief of the Assembly of First Nations): "Even though First Nations do not adhere to a single world view or moral code, there are nonetheless commonalties in the approach of all First Nations to justice issues."

8. See generally, Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, Volume I, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991) [hereinafter AJI]. See also RCAP: *Bridging*, *supra* note 1, at 26-8, and at 309 where it is stated that the principal reason for this failure is the "fundamentally different world views" of Aboriginal and non-Aboriginal peoples regarding basic issues such as "the substantive content of justice and the process of achieving justice."

9. AJI, *ibid.* at 85-6.

10. *Ibid.* at 106-7.

11. *Ibid.* at 86.

12. Star Phoenix, "Sask.'s Metis numbers swell" (14 Jan. 1998: B2): 1996 Census figure from Stats Can indicates 11.4 % of Saskatchewan population is Aboriginal; *Juristat*, Canadian Centre for Justice Statistics (Statistics Canada) Vol. 17 no. 4 at 6 (1995-6 corrections admissions).

13. John H. Hylton, "Financing Aboriginal Justice Systems" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) 150 at 155.

14. Michael Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) *U.B.C. L. Rev.* Special Edition 147 at 149 [hereinafter "Pathways"]. RCAP: *Bridging*, *supra* note 1 at 28-9 states: "Reports and inquiries...have not only confirmed the fact of over-representation but, most alarmingly, have demonstrated that the problem is getting worse, not better."

15. For a discussion of theories of over-representation see Luke McNamara, *Aboriginal Peoples, the Administration of Justice, and the Autonomy Agenda: An Assessment of the Status of Criminal Justice Reform in Canada With Reference to the Prairie Region* (LL.M. Thesis, University of Manitoba, 1992) [published as same title, Research Report, Legal Research Institute of the University of Manitoba], cited to Thesis manuscript. At 18-40 he states that initially it was assumed that the criminal justice system was fair and effective and that educating Aboriginal peoples about it would provide solutions. Currently there is recognition

that the system has inadequacies. McNamara states at 36 that the problem is increasingly being recognized as denial of the legitimate autonomy of Aboriginal people. See also "Pathways", *supra* note 14 at 148-9 for the view that the over-representation of Aboriginal peoples in the justice system is representative of two factors: that they commit more crimes, and that they are subject to systemic discrimination. At 154 a third theory is discussed, which is that colonization as an historical and political process has "made native people poor beyond poverty." See also RCAP: *Bridging*, *supra* note 1 at 39-53 for a detailed discussion of the causes of over representation and Aboriginal crime.

16. RCAP: *Bridging*, *supra* note 1 at 42.

17. AJI, *supra* note 8 at 85.

18. *Ibid.* at 88.

19. *Ibid.* at 91. This is also noted by Jackson in "Pathways", *supra* note 14 at 154.

20. RCAP, *Bridging*, *supra* note 1 at 52:

...locating the root causes of Aboriginal crime in the history of colonialism, and understanding its continuing effects, points unambiguously to the critical need for a new relationship that rejects each and every assumption underlying colonial relationships between Aboriginal peoples and non-Aboriginal society.

21. "Spiritual Healing Lodge" (Paper prepared on behalf of the Twelve First Nations Bands of the Prince Albert Grand Council, Nov. 1994) at 6.

22. See generally, RCAP: *Bridging*, *supra* note 1 at 33-9.

23. AJI, *supra* note 8 at 36-46 and 96-113. At 97 'prejudice' is defined as the forming of "negative opinions about persons because of specific attributes, such as skin colour, religion, physical handicap, or other attributes". 'Discrimination' is acting in a certain way because of prejudice. 'Racism' is "a form of discrimination."

24. RCAP: *Bridging*, *supra* note 1 at 43-6.

25. AJI, *supra* note 8 at 86.

26. *Ibid.* at 368. The AJI was "disturbed" that the Crown attorneys surveyed in Manitoba found little wrong with the way Aboriginal people were treated by the justice system. AJI stated that if changes are to be made, Crown counsel co-operation would be essential. This attitude, that little is wrong, may help explain,



in part, why Saskatchewan Crown attorneys appeal or object to sentencing circles in various cases.

27. The differences between being Aboriginal and being non-Aboriginal are discussed by Judge Murray Sinclair, "Aboriginal Peoples, Justice and the Law" in Gosse, Henderson and Carter, eds., *supra* note 13, 173 at 175-184. At 175 he states that to understand what is wrong with the existing justice system for Aboriginal peoples, one has to understand that being Aboriginal and non-Aboriginal may involve being different. See also, Dumont, *supra* note 4 at 66. His chart entitled "Zone of Conflict in the Justice Arena" contrasts the Aboriginal response to the law to the expectations of the legal system.

28. For an excellent discussion of the Circle of Life, see "Healing Lodge Vision" (Vision statement prepared for the Healing Lodge for Federally Sentenced Women in Maple Creek, Saskatchewan) at 3-6.

29. M. Poitras, "Alternative Dispute Resolution Sentencing Circles" (University of Saskatchewan, Saskatoon, 1994) [unpublished] at 12.

30. AJI, *supra* note 8 at 21.

31. Teresa M. James, *Circle Sentencing* (Supreme Court of the Northwest Territories, 1993) [unpublished] at 3-4; Rupert Ross, *Dancing With a Ghost: Exploring Indian Reality* (Markham, Ontario: Octopus Publishing Group, 1992) [hereinafter, *Dancing*] at 12-28. However, see J. B. Minore, "Not Just "Potato Chip" Thieves" in Robert A. Silverman & Marianne O. Nielsen, eds., *Aboriginal Peoples and Canadian Criminal Justice* (Toronto: Harcourt Brace & Company, 1992) 279 at 290 where he questions the universality of the ethic of non-interference.

32. AJI, *supra* note 8 at 29.

33. Rupert Ross, "Leaving Our White Eyes Behind: The Sentencing of the Native Accused" in Silverman and Nielsen, eds., *supra* note 31, at 145 [hereinafter "White Eyes"]. See also *Dancing*, *supra* note 31 from which much of the information regarding ethics and world view is taken; and AJI, *supra* note 8 at 29-39.

34. "White Eyes", *ibid.* at 146.

35. "Dancing", *supra* note 31, at 16-20.

36. James, *supra* note 31 at 4-5; *Dancing*, *supra* note 31 at 16-20.

37. Patricia A. Monture-OKanee, "Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s" (RCAP Round Table *supra* note 4) 105 at 121

[hereinafter "Reclaiming Justice"].

38. Jean-Paul Brodeur, *Justice for the Cree: Policing and Alternative Dispute Resolution* (The Grand Council of the Crees (Quebec), September 1991) at 41. See also James, *supra* note 31 at 4; *Dancing*, *supra* note 31, at 13-4.

39. It is interesting to note a very different perspective in RCAP: *Bridging*, *supra* note 1 at 197:

One of the great strengths of Aboriginal justice processes may well be that individuals who deny responsibility in the non-Aboriginal system-because they fear the punitive sanctions underlying that system-will be prepared to accept responsibility for their actions in Aboriginal systems based on goals of restorative justice.

40. Sinclair, *supra* note 27 at 180.

41. "White Eyes", *supra* note 33 at 23-4.

42. James, *supra* note 31 at 5.

43. Accordingly, conflict may not be resolved: Krawll, *supra* note 3, at 14:

Many Aboriginal people have been taught not to express themselves verbally or to raise issues in public that may lead to conflict. A part of healing is often empowering individuals to "break their chains of silence" and speak openly and freely about how they feel and what concerns them.

This is necessary for a sentencing circle to be effective. See also *Dancing*, *supra* note 31 at 28-34.

44. See Chapter Three, below at 112-3, 116.

45. *Dancing*, *supra* note 31 at 34-5.

46. *Ibid.* at 34-5.

47. *Ibid.* at 35-7.

48. "White Eyes", *supra* note 33 at 148.

49. *Dancing*, *supra* note 31 at 38-9.

50. AJI, *supra* note 8 at 39.

51. *Ibid.* at 18; Leonard Mandamin, Dennis Callihoo, Albert Angus and Marion

Buller, "The Criminal Code and Aboriginal People" *U.B.C. L. Rev. supra* note 14, 5 at 6.

52. AJI, *supra* note 8 at 24.

53. RCAP: *Bridging, supra* note 1 at 14.

54. Ross Gordon Green, *Aboriginal Sentencing and Mediation Initiatives: The Sentencing Circle and Other Community Participation Models in Six Aboriginal Communities* (LL.M. Thesis, University of Manitoba, 1995, unpublished) at 41. See also Curt Griffiths and Allan L. Patenaude, "Aboriginal Peoples and the Criminal Law" in Silverman & Nielsen, eds., *supra* note 31, 69 at 71-2 for an excellent comparison of Euro-Canadian and Aboriginal law concepts.

55. AJI, *supra* note 8 at 45.

56. Don Worme, "First Nations Perspective on Self-Government" in Gosse, Henderson & Carter, eds., *supra* note 13, 77 at 79.

57. Sinclair, *supra* note 27 at 178.

58. Patricia Monture-OKanee, "Thinking About Aboriginal Justice: Myths and Revolution" in Gosse, Henderson and Carter, eds., *supra* note 13, 222 at 227.

59. Indian law has historically been recognized as a valid form of law. Indian common law is "simply Indian or Aboriginal norms, values, moral principles and even emotions, which are enforced by institutions": James W. Zion, "Taking Justice Back: American Indian Perspectives", RCAP Round Table, *supra* note 4, 309 at 312. The Chief Justice of the Navajo Nation similarly defines the Navajo common law as

the values and moral principles of the Navajo People; their customs, usages, and ways of doing things. Something that we just know, we speak of, we think it, we eat it, and we sleep it .

Robert Yazzie, "Navajo Justice Thinking" (Paper presented at Tribal Court Symposium, 30-1 Mar. 1994, Saskatoon) at 12.

60. Tom Sampson, "South Vancouver Island Justice Education Project", RCAP Round Table, *supra* note 4, 390 at 392.

61. Christie Jefferson, *Conquest By Law* (Supply and Services Canada, Aboriginal Peoples Collection, Corrections Branch, Solicitor General Canada, Written in 1978, published in July 1994) at 1, 21, 33.

62. Mary Ellen Turpel, "On the Question of Adapting the Canadian Criminal Justice

System for Aboriginal Peoples: Don't Fence Me In", RCAP Round Table, *supra* note 4, 161 at 173-79 [hereinafter "Don't Fence Me In"].

63. See Leroy Little Bear, "What's Einstein Got To Do With It?" in Gosse, Henderson & Carter, eds., *supra* note 13, 69 at 72 for a discussion of Euro-Canadian specialization as contrasted to a holistic approach to problem solving.

64. AJI, *supra* note 8 at 22.

65. Zion, *supra* note 59 at 315-6.

66. Aboriginal peoples have oral traditions of knowledge, history and law as noted by P.A. Monture-OKanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" *U.B.C. L. Rev.*, *supra* note 14, 239, at 245:

This does not mean that aboriginal systems of law were not as "advanced" or "civilized" as European-based systems; these are racist stereotypes. It merely means that aboriginal law was conceptualized in different but equally valid ways. Laws were not written because law needs to be accessible to everyone. When an oral system is effective, the law is carried with each individual wherever he or she travels. Thus, a system in which laws are accessible only through lawyers and professionals seems very remote, unapproachable, and not connected to the kinship structure of aboriginal communities.

67. See RCAP: *Bridging*, *supra* note 1 at 12-25 for a discussion of social control in various Aboriginal nations.

68. Jean-Paul Brodeur, Carol La Prairie & Roger McDonnell, *Justice for the Cree: Final Report* (The Grand Council of the Crees (Quebec) August, 1991) 55 for a discussion of kinship and its importance in law enforcement.

69. AJI, *supra* note 8 at 35.

70. "Reclaiming Justice", *supra* note 37 at 130 (in endnote 62).

71. "Pathways", *supra* note 14 at 194.

72. J. Couture, "Traditional Aboriginal Spirituality and Religious Practice in Prison" in Silverman & Nielsen eds., *supra* note 31, 199 at 201.

73. See Chapter Three, below at 106-7.

74. Michael Jackson, *Locking Up Natives in Canada: A Report of the Canadian Bar*

*association Committee on Imprisonment and Release* (Ottawa: CBA, 1988), 83 [hereinafter *Locking Up*].

75. RCAP: *Bridging*, *supra* note 1 at 272-4.

76. "Don't Fence Me In", *supra* note 62 at 176.

77. See for example, "Aboriginal Self-Government and Corrections" (Correctional Services of Canada, Prince Albert: Corrections Canada Conference-The Care and Custody of Aboriginal Offenders, 15-7 Feb. 1995) at 6:

Aboriginal spiritual programs have spawned a new healing philosophy within correctional institutions for Aboriginal offenders.

The involvement of elders and liaison workers have allowed for development of culturally based counselling programs and in some institutions, culturally sensitive intake assessments.

The *Corrections and Conditional Release Act*, S.C., 1992, c-20, S.83(1) states: "For greater certainty, aboriginal spirituality and aboriginal spiritual leaders and elders have the same status as other religions and other religious leaders" (as noted in "Increasing Métis Involvement in Corrections" (Correctional Services of Canada, 31 Jan. 1995) at 9 [hereinafter "Metis Involvement"]).

78. *Locking Up*, *supra* note 74 at 91.

79. Jefferson, *supra* note 61, at 38.

80. The concept of the family group conference was borrowed from the Maori people of New Zealand and was adopted by New Zealand and Australian police forces to deal with juvenile offenders. Family group conferences are beginning to be recognized and used in Canada. See generally B.J. Brown and F.W.M. McElrea, eds., *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, No. 34, 1993).

81. Don McCaskill, "When Cultures Meet", Silverman & Nielsen eds., *supra* note 31, 31 at 38.

82. Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform", Gosse, Henderson & Carter, eds., *supra* note 13, 206 at 209. She goes on at the same page to state that the agenda for reform is emerging from the experiences of communities involved in such projects as sentencing circles.

83. The majority decision of the Northwest Territories Court of Appeal in *R. v. Naqitarvik*, [1986] 26 C.C.C. (3d) 193 rejected the role of the community's "traditional Inumarit committee" in the counselling and rehabilitation of the offender

and would not allow its sentence to replace the usual lengthy imprisonment for sexual assault. The decision indicated that because the committee was not truly traditional, it was not valid:

The modern reincarnation in Arctic Bay of the traditional Inumarit Committee resembles the usual community counselling service rather than the traditional governing and counselling body of earlier times. I am unable to see, given its recent origin, the community which it serves, its methods of operation, and the absence of the traditional ultimate sanction on the offender, that it is a remnant of ancient culture. Its counselling service, admirable as it undoubtedly is, cannot, in my opinion, replace the sentence of imprisonment with is required in virtually all cases of major sexual assault" (per: Laycroft C.J.N.W.T.).

This approach was rejected by Dickson-Gilmore who questioned why non-Aboriginal people would take issue with the source of justice or community structures if Aboriginal peoples have determined that they are appropriate for them:

For Canadians to deny the legitimacy of indigenous traditions on the bases that they are the product of invention or on some similar way not 'really' traditional is, at best, unfair and at worst, hypocritical.

E. J. Dickson-Gilmore, "Finding the ways of the ancestors: Cultural change and the invention of tradition in the development of separate legal systems" (1992) 34 *Can. J. Crim.* 479 at 499. At 500, she argues that it should be for the Aboriginal people involved to determine what is legitimate or traditional for them, not for the non-Aboriginal justice system to once more impose its values:

whether what they propose is 'really traditional' is secondary to the importance of alleviating the current position of native people within Canadian legal traditions. Thus what may be central here is not whether the systems are based on 'rightful' traditions, but whether those systems are the right ones for the native nations who will administer them. And, that, in itself, is a matter which native nations only can determine.

84. *R. v. Bogdan*, 11 Sept. 1996 (Sask. Prov. Ct.).

85. See, for example, the comments of Carol La Prairie, *Justice For The Cree: Communities, Crime and Order* (The Grand Council of the Crees (Quebec) August 1991) at 21 where she states that band councils in communities which have extensive family ties can result in the perception and the reality of favouritism, nepotism and conflict of interest. There can also be a greater emphasis on political rather than social issues, particularly when band councils are major employers and decision-makers for the community.

86. RCAP Round Table, *supra* note 4 at 419 states that there have been more than 30 government-sponsored justice studies since 1967. The most extensive study undertaken is the Royal Commission on Aboriginal Peoples which released its final report in 1996. Most of the recommendations of these studies have not been implemented because of a lack of political will to do so, or because of funding or bureaucratic constraints. Many of the reforms which are implemented have been criticized as not addressing the marginalization of Aboriginal peoples. An inventory of Aboriginal justice programs tallied over 400 justice projects, programs and research projects at the federal and provincial levels: "Métis Involvement", *supra* note 77 at 28.

87. John Giokas, "Accommodating the Concerns of Aboriginal People Within the Existing Justice System", RCAP Round Table, *supra* note 4, 184 at 187.

88. AJI, *supra* note 8 at 253-255, 264, 323.

89. RCAP: *Bridging*, *supra* note 1 at 93.

90. *Ibid.*

91. Judge Patricia Linn, *Report of the Saskatchewan Indian Justice Review Committee* (Government of Saskatchewan, 1992) at 42 recommended that Saskatchewan judges increase the use of culturally appropriate alternate sentencing measures, and that they be more flexible and creative in the sentencing and remanding of Aboriginal offenders.

92. RCAP: *Bridging*, *supra* note 1 at 93.

93. McNamara, *supra* note 15 at 70-2.

94. See Chapter Four, below at 155-9.

95. RCAP: *Bridging*, *supra* note 1 at *xii*, where the Commission states that the framework for change has two dimensions: "the reform of the existing criminal justice system" and "the establishment of Aboriginal justice systems as an exercise of the Aboriginal right of self-government". See also pp. 177-283, Chapter 4, "Creating Conceptual and Constitutional Space for Aboriginal Justice Systems".

96. Richard Gosse, "Charting the Course for Aboriginal Justice Reform Through Aboriginal Self-Government", in Gosse, Henderson & Carter, eds., *supra* note 13, 1 at 16. See also Little Bear, *supra* note 63, 69 at 75 where he discusses two reasons why we are not making progress on the issue of reform or change in the administration of criminal justice: "fear and vested interest in the existing system."

97. John Tait, "The Federal Perspective on the Split in Jurisdiction", in Gosse, Henderson & Carter, eds., *supra* note 13, 119 at 123.

98. See Hylton's analysis, *supra* note 13, 150 at 159-163, in which he concludes that a reallocation of government funding would be difficult, but that there is no alternative. At 165 he concludes:

Aboriginal programs have the very real potential of creating greater levels of satisfaction with the justice system among both Aboriginals and non-Aboriginals. Aboriginal programs can achieve higher levels of effectiveness and they need not involve more costs. Moreover, a stronger commitment to Aboriginal programs has the potential to create social and economic conditions in Aboriginal communities that will reduce the incidence of those very problems we have created a vast state apparatus to control.

99. Royal Commission on Aboriginal Peoples, "The Future of Aboriginal Justice in Canada", *The Circle*, 3 Apr. 1993.



## **CHAPTER TWO**

### **THE SENTENCING HEARING AND THE PURPOSE AND PRINCIPLES OF SENTENCING**

#### **2.1 INTRODUCTION**

The sentencing circle is an innovative process. However, its foundations lie in the justice system and in the existing sentencing hearing and the purpose and the principles of sentencing. Sentencing practices, theory, judicial precedents and legislation are the framework from which the sentencing circle is evolving.

In reality, our criminal courts are sentencing tribunals rather than trial courts. The majority of defendants either plead guilty or are convicted following a trial. For them, sentencing is likely the most important process in the justice system.<sup>1</sup> Sentencing also impacts the offender's family, victims and their families, and the community.<sup>2</sup> However, despite its importance, the sentencing process often receives very little attention from judges and Crown and defence counsel. Counsel may not view the sentencing hearing as crucial and may not direct their time and energies to recommending detailed sentencing plans. However, it is important that offenders are well represented at the sentencing hearing. Poor preparation or inadequate representations can affect the outcome of the hearing. As community-based sentencing alternatives become more common, the difference between incarceration and a probation order or a conditional sentence served in the

community may depend upon the skills of defence counsel (and the willingness of Crown counsel to agree to an alternative to incarceration).

The Canadian sentencing process should have the potential to allow for effective sentencing. The *Criminal Code*<sup>3</sup> provides few mandatory sentences and instead, establishes maximum penalties or a range of sanctions. The judge would seem to have a wide range of sentencing options: absolute discharge; conditional discharge with probation; suspended sentence with probation; fines; compensation or restitution orders; imprisonment (including intermittent and indeterminate sentences); imprisonment followed by probation; forfeitures and prohibitions; and conditional sentences. The newest option is the conditional sentence which has been implemented by the 1996 amendments to the *Criminal Code*.<sup>4</sup> It provides that offenders may serve sentences of less than two years incarceration in the community (provided that there is no minimum term of incarceration proscribed by the *Criminal Code*; that the judge is satisfied that the public safety is not compromised; and that the sentence is consistent with the fundamental purpose and principles of sentencing contained in s.718-718.2). Conditional sentences are subject to certain mandatory conditions as well as optional conditions determined by the judge.<sup>5</sup> The amendments to the *Criminal Code* also provide that "alternative measures" (i.e. other than judicial proceedings) may be used to deal with offenders.<sup>6</sup>

However, despite this wide range of options, Canadian judges are generally not imposing sentences that deal with victims' issues, that assist in the rehabilitation of the offender, that restore harmony and that show society's

disapproval. Rather, judges are resorting to incarceration (which, for indictable offences, is the "single most used sentence" and is also "the one which is the most expensive, most punitive and least effective"<sup>7</sup>). It seems that the sentencing discretion of the judge is limited.<sup>8</sup> This is a discouraging assessment of the Canadian sentencing process. (It is too early to assess with certainty the impact of the changes to the *Criminal Code*. However, the use of conditional sentences may have reduced the use of incarceration,<sup>9</sup> and new sentencing provisions regarding payment of fines appear to be reducing the number of offenders jailed for default of payment<sup>10</sup>).

This Chapter will examine the sentencing hearing and the purpose and principles of sentencing as enunciated by the Saskatchewan Court of Appeal in *R. v. Morrisette*,<sup>11</sup> in the new sentencing provisions of the *Criminal Code*, and in the new direction of the Supreme Court of Canada on the issue of sentence appeals.

A detailed analysis of the theory of the principles of sentencing is beyond the scope of this Thesis. The purpose of this Chapter is to briefly set the stage for the introduction of sentencing circles into the justice system.

## **2.2 THE SENTENCING HEARING**

Part XXIII of the *Criminal Code* (s.716-751.1)<sup>12</sup> deals with sentencing. In a sentencing hearing the judge hears from Crown and defence counsel (or the offender if he or she is unrepresented). They usually speak to the facts of the offence, give some background information about the offender and produce any previous record. Pursuant to s.726 of the *Code*, the offender must be given the

opportunity to speak at the sentencing hearing. Usually, he or she does not do so. Evidence may be called by either counsel. The judge may order the preparation of a pre-sentence or other report (often at the request of counsel).<sup>13</sup> Both counsel make submissions to the judge on an appropriate sentence. Counsel may have agreed upon the circumstances of the offence, the record of the offender and a suggested sentence.

The judge has the opportunity to observe an offender in court and may have heard him or her testify during the trial or speak during the sentencing hearing. Often, however, the offender will not have spoken at any time. The judge has the final sentencing power and is not bound to accept a joint sentencing submission. Recommendations for sentences are often based upon what is the norm in that particular court or province (in terms of standard fines or starting points for periods of incarceration). Innovative options for sentencing involving the community and the victim, and detailed plans for rehabilitation and compensation are not usually presented to the judge. It would be unusual to hear discussions of whether the sentence suggested will help the offender rehabilitate or help the victim deal with the effects of the offence.

The adversarial rules of the trial are somewhat relaxed at the sentencing hearing. Information is received in open court. The offender is entitled to be present during presentation of the evidence and has the right to contradict that evidence or offer new evidence. The role of defence counsel is to remain adversarial at the sentencing hearing, and to get the most favourable disposition for his client, not the best disposition for society.<sup>14</sup>

Sentencing hearings are usually brief. Often very little information is heard about offenders and their backgrounds and about the effect of the incident upon the victim, the community and the families of both the victim and offender. The victim plays no role in a sentencing hearing other than that provided by the victim impact statement.<sup>15</sup> The criminal record of the offender and factors such as the seriousness of the offence and its circumstances, and previous bad character of the offender, may weigh heavily against a sentence emphasizing rehabilitation. The factors that may be taken into account in aggravation or mitigation of sentence in the ordinary sentencing hearing are not necessarily factors which may be important to the participants in a sentencing circle.<sup>16</sup> Young and first time offenders will usually receive the benefit of a 'second chance' or a rehabilitation plan at the sentencing hearing, while repeat offenders will likely receive increasingly harsh punishments.<sup>17</sup>

The discretion of the judge and counsel is very important at the sentencing hearing. The exercise of that discretion carries with it the potential for bias, abuse and systemic discrimination.<sup>18</sup> The Supreme Court of Canada in *R. v. Gardiner* noted the role of discretion and also stated that the sentence is to be oriented to the offender, not to the crime:

The Judge traditionally had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime. Counsel for both the Crown and the offender have discretion about the evidence they present and submissions made regarding appropriate sentences. A judge has a wide range of sentencing options and wide discretion about the weight to give various sentencing principles and sentencing options.<sup>19</sup>

However, despite the judge's discretion and the availability of alternatives to incarceration, there is little creativity in sentencing and an over-reliance on incarceration:

It often appears that judges do not feel they are confronted with a continuum of sentencing options, but, rather, a dichotomy: incarceration, which is viewed in some ways as a "real" sentence, or some form of community sanction, which is viewed as a form of "leniency".<sup>20</sup>

(It seems that sentencing circles are viewed by the public in the same light: they are not real sentencing hearings, they are a display of leniency).

Of importance to the sentencing circle is the requirement in s.718.2(d) of the *Criminal Code* amendments that the court is to take into account enumerated sentencing principles (including that an offender is not to be deprived of liberty if there is a less restrictive, appropriate sanction),<sup>21</sup> and that the judge consider all reasonable sanctions other than imprisonment "with particular attention to the circumstances of aboriginal offenders."<sup>22</sup>

## **2.3 THE PURPOSE OF THE CRIMINAL JUSTICE PROCESS AND OF SENTENCING**

*Morrisette* has been the leading case in Saskatchewan dealing with sentencing. It states that "the principle purpose of the criminal process, of which sentencing is an important element is the protection of society."<sup>23</sup> In both traditional Aboriginal societies and Euro-Canadian society, the primary purpose of the justice system or customary law is the protection of the public. However, this goal is viewed from different perspectives. Aboriginal communities generally focus

on healing the victim, the offender and the community as the way to protect their society (restorative justice). The Euro-Canadian approach is to use adversarial and punitive methods to punish and prevent offensive conduct.

The recent amendments to the *Criminal Code* attempt to deal with the purpose, objectives and principles of sentencing by statutory definition. Section 718 states:

718. *The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society* by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community [emphasis added].<sup>24</sup>

If we mesh the concepts of the purpose of the criminal process and the purpose of sentencing, we can conclude that the over-riding concern of criminal justice is the protection of society (protection of the public). The question that the sentencing circle and the restorative justice movement raises is how public protection can best be achieved. An examination of the principles of sentencing and how they are *supposed* to achieve the protection of the public will help us understand the debate surrounding the use of sentencing circles.

## 2.4 THE PRINCIPLES OF SENTENCING

The "fundamental principle" of sentencing as contained in s.718.1 of the *Criminal Code* is that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."<sup>25</sup> S.718.2 contains "other sentencing principles":

s.718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child, or,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

*Morrisette* sets out the factors (or principles of sentencing) to be considered by the court in achieving the goal of the protection of the public through the sentencing process:

- a) punishment;
- b) deterrence;



- c) the protection of the public; and
- d) the reformation and rehabilitation of the offender.<sup>26</sup>

In the *Morrisette* analysis, the protection of the public overlaps as both the purpose of the criminal process and one of the factors to consider when determining the sentence.<sup>27</sup>

The *Criminal Code* sets out in s.718 the following objectives of the sanctions imposed by a court upon an offender:

- a) denunciation of unlawful conduct;
- b) specific and general deterrence;
- c) separation of offenders from society where necessary;
- d) rehabilitation;
- e) reparations to victims or community;
- f) promotion of the responsibility of the offender and the acknowledgement of harm done to the victim and the community.

These recent amendments have expanded upon *Morrisette* (although in reality, they have codified principles which are part of sentencing theory). For example, denunciation could be seen as part of deterrence in *Morrisette*. Incapacitation, reparation, the responsibility of the offender and acknowledgement of harm done as contained in the *Criminal Code* could be seen as part of protection of the public in *Morrisette*.

It would seem that sentencing is still controlled by the same considerations. The approach taken by the courts to the new sentencing provisions (particularly conditional sentences) will be important to the development and use of sentencing circles. It remains to be seen whether the approach to sentencing will be significantly different from the approach developed in *Morrisette*. There has been a significant development in the standard of review for a sentencing appeal as

enunciated by the Supreme Court of Canada (which will be discussed below). This should impact sentencing practices by increasing the discretion of the sentencing judge and reducing the role of the appeal courts.

## **2.5 THE IMPLEMENTATION OF SENTENCING PRINCIPLES**

One of the problems in sentencing, as recognized by the Saskatchewan Court of Appeal in *Morrisette*<sup>28</sup> and more recently in *R. v. McLeod*,<sup>29</sup> is to determine which factor or factors should be given the greatest weight in any particular case. The trial judge has discretion, subject to the guidelines of the Court of Appeal, to determine the weight to give to the principles of sentencing. There is usually a conflict in the submissions made by counsel at the sentencing hearing. Defence counsel may recommend that rehabilitation, reparation and responsibility of the offender be considered to be the most important factors, while Crown counsel may ask for a harsh sentence or incarceration to protect the public, to denounce the conduct and to provide general and specific deterrence.

But, if the purpose of sentencing is to provide for the protection of society, the real issue is how this can be best achieved. Is the public best protected through the rehabilitation of the offender or by his or her incapacitation (incarceration)? Should an example be made of the offender (denunciation and general deterrence), even if this might hamper rehabilitation and reintegration into society? Should a harsh sentence be used to deter that particular offender from further criminal activity (specific deterrence)?

These are issues which cause difficulty in the sentencing process. However,

the problems become particularly apparent in the acceptance of the sentences recommended by the participants of a sentencing circle (which, to the public, often appear to be lenient). There is conflict between the restorative approach of a sentencing circle and the perceived need for punishment, denunciation, and deterrence in the usual sentencing hearing.

The role of the Court of Appeal in sentencing was set out in *Morrisette*.

Chief Justice Culliton stated that the Court of Appeal is responsible for:

stating the principles underlying the imposition of a sentence so that at least uniformity of approach may be achieved. Also, while there can be no such thing as uniform sentences, it is incumbent upon the appellate Court to see that the disparity in sentences for the same or similar offences can be rationalized.<sup>30</sup>

Sentences should be capable of demonstrating a uniform *approach* to sentencing and the differences in sentences should be capable of being rationalized. The philosophy of rationalizing sentence disparity often operates against rehabilitation because the principles of deterrence and protection of the public are often given more weight than rehabilitation of the offender. Using this approach, it may be particularly difficult to rationalize a rehabilitative sentence for an offender with a lengthy record, even though this particular offender may have reached the point where rehabilitation is a realistic objective.

The Supreme Court of Canada has given new direction to the provincial courts of appeal on the issue of the standard of review for sentence appeals. It has adopted a 'deferential' standard of review which should give more discretion to sentencing judges.

In the first of three cases to take this approach, *R. v. Shropshire*, it was held

that:

An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the Court of Appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.<sup>31</sup>

The Supreme Court went on to say “unreasonableness” of the sentence occurs if it is outside the “acceptable range” of sentences,<sup>32</sup> or if the “sentencing judge applied wrong principles.”<sup>33</sup> If the judge considered the relevant facts and applied correct principles, the sentence will be viewed as fit unless it is clearly “excessive or inadequate.”<sup>34</sup>

In the second case, *R. v. M.(C.A.)*, the Supreme Court took the same approach as *Shropshire* and emphasized the discretion of the trial judge:

Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a *discretion* to determine the appropriate degree and kind of punishment under the *Criminal Code* [emphasis in original].<sup>35</sup>

The Supreme Court stated that this standard of review is justified because the sentencing judge has observed the trial (or in the case of a guilty plea, the sentencing hearing) and is able to assess the submissions of the Crown and defence. As well, the sentencing judge “possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal

justice system” and he or she will

normally preside near or within the community which has suffered the consequences of the offender’s crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be “just and appropriate” for the protection of that community.<sup>36</sup>

The Court stated that appellate courts have a role in minimizing disparity of sentences but that

courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges.<sup>37</sup>

This should mean that courts of appeal cannot interfere lightly with the sentencing discretion of judges. This in turn should give sentencing judges more room for creativity and for sensitivity to the needs and concerns of the local community.

Of further importance to sentencing circles are the statements that there is

no such thing as a uniform sentence for a particular crime...Sentencing is an inherently individualized process...sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the “just and appropriate” mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.<sup>38</sup>

Although this judgment was not rendered in the context of a sentencing circle, the acknowledgement that sentencing goals may vary in different communities is important to sentencing circles. Circles are community-oriented and develop a sentencing plan for a particular community, not for general application.

In the most recent decision, the Supreme Court in *R. v. McDonnell* over-

turned an appeal court decision stating:

the decision of the Court of Appeal was inconsistent with the deference that is owed to sentences by appellate courts...the sentencing judge did not commit an error in principle, did not ignore relevant factors and did not impose a demonstrably unfit sentence.<sup>39</sup>

*McDonnell* is important for sentencing circles as it dealt with starting point sentences (that are often in conflict with the recommendations of circle participants).

The Supreme Court held that

the sentence's departure from the Court of Appeal's view of the appropriate starting point does not in itself imply that the sentence was demonstrably unfit.<sup>40</sup>

The judgment of the majority states

appellate courts may set out starting-point sentences as guides to lower courts. Moreover, the starting point may well be a factor to consider in determining whether a sentence is demonstrably unfit. If there is a wide disparity between the starting point for the offence and the sentence imposed, then, assuming that the Court of Appeal has set a reasonable starting point, the starting point certainly suggests, but is not determinative of, unfitness.<sup>41</sup>

The importance of these three judgments can be seen in the recent decision of the Saskatchewan Court of Appeal in *R. v. Taylor* (discussed below).<sup>42</sup>

The Saskatchewan Court of Appeal also considered the three Supreme Court cases in *R. v. Horvath* which distinguished between the approach to appellate review in the three Supreme Court cases and in *Morrisette*:

The strong deferential approach enunciated in *Shropshire, C.A.M.* and *McDonnell* differs from and must now be substituted for the much lower deferential approach heretofore used by this court as exemplified in such cases as *R. v. Morrisette*...and *R. v. Morin*.<sup>43</sup>

This deferential approach should give sentencing judges and sentencing circles

more latitude in fitting the sentence to the offender rather than to the offence. It should also give new discretion to the sentencing judge in determining which sentencing principles to emphasize in crafting a fit sentence.

### 2.5.1 Punishment

Punishment is not specifically enumerated in the new sentencing provisions as one of the objectives of the sanctions imposed upon an offender. *Morrisette* sets out that punishment is best viewed as "enforced deprivation" rather than as "vengeance and retribution."<sup>44</sup> The principle of punishment involves aspects of various theories of sentencing, particularly retribution. Retribution is payment by punishment for a crime<sup>45</sup> and has aspects of revenge, vengeance ("the taking of revenge: infliction of punishment in return for an injury or offence"<sup>46</sup>), just deserts (the worth of the punishment<sup>47</sup>), and expiation ("the act of making atonement: the extinguishing of guilt by suffering or penalty"<sup>48</sup>). However, the Supreme Court of Canada in *M. (C.A.)* stated:

retribution bears little relation to vengeance...vengeance has no role to play in a civilized system of sentencing...Retribution in a criminal context...represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender...unlike vengeance, retribution incorporates a principle of restraint; retribution requires imposition of a just and appropriate punishment and *nothing more* (emphasis in original).<sup>49</sup>

Just deserts is important as it represents the concept of offenders receiving what they deserve in terms of the severity of the punishment being proportional to the responsibility of the offender and the seriousness of the offence and harm

done. This is an aspect of what is often termed proportionality. Proportionality is part of retribution in terms of the punishment being appropriate to the crime and the offender and “nothing more.” It is the basis for s.718.1 of the *Code*: “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”<sup>50</sup> The sentence reflects the harm done, not future potential harm. However, proportionality has to do with the quantum of the sentence rather than the focus of the sentence (i.e. it isn’t concerned with whether the sentence is to be rehabilitative or is to be a deterrent or a punishment). Proportionality also impacts on the issue of disparity: if punishment is proportionate, it should also be consistent and uniform. A key element of retribution is parity: a retributive sentence represents an appropriate punishment reflecting the moral culpability of the offender. This will mean that sentences should be uniform and consistent. There is no room for sentences that reflect a restorative approach or a different focus than parity.

The important question is: what does punishment accomplish in terms of ‘the protection of society’? Does a harsh sentence protect society or does it accomplish only vengeance? Euro-Canadian concepts of justice are very different from Aboriginal perspectives. Aboriginal perspectives involve the healing of the offender, the victims and the communities, and a restoration of the parties to their former position (as much as is possible). The Euro-Canadian system looks to a sentencing philosophy which is a mixture of punishment, retribution and proportionality. It is more concerned with offenders getting ‘what they deserve’, in accordance with what other offenders have received in similar circumstances, than



with examining why offenders act as they do, and what can be done to make things right between the offender and the victim and within the community.

This conflict between Euro-Canadian and Aboriginal perspectives is the focus of the debate over sentencing circles. The acceptance of sentencing circles as a legitimate sentencing tool depends upon reorientation from the need for punishment for an offence to the need to examine offenders and the consequences of their actions. Chief Justice Bayda in *R. v. Horvath*, in dealing with conditional sentences, stated:

the enactment of s. 742.1 is, in my respectful view, an attempt by Parliament to blend certain goals of retributive justice (to use the current parlance) with certain goals of restorative justice. It is a parliamentary intention that the judiciary should do their utmost to bring to fruition.<sup>51</sup>

It is to be hoped that this particular direction by the Saskatchewan Court of Appeal will be continued and will lead to greater acceptance of the restorative approach in Saskatchewan.

### **2.5.2 Deterrence**

Deterrence takes two distinct forms: specific and general. Specific deterrence is aimed at the offender and what will deter this offender from repeating the offence or posing a further risk to society. Specific deterrence can be viewed as intimidation. However, if specific deterrence worked, recidivism rates would be low. Recidivism rates suggest that specific deterrence does not work.<sup>52</sup> It may be that lesser punishments are more successful in reducing recidivism than is incarceration. *Morrisette* sets out that if specific deterrence is the purpose of the

punishment then "greater consideration must be given to the individual, his record and attitude, his motivation and his reform and rehabilitation."<sup>53</sup> This focus on the offender is more in line with Aboriginal than with Euro-Canadian views.

General deterrence is aimed at the public and the prevention of crime by the threat of punishment.<sup>54</sup> *Morrisette* sets out that general deterrence should be considered from an objective view and that

the gravity of the offence, the incidence of the crime in the community, the harm caused by it either to the individual or to the community and the public attitude towards it are some of the matters to be considered.<sup>55</sup>

General deterrence is considered by the court to be a necessary component of sentencing so that a message is sent to the public that certain conduct will not be tolerated. It assumes that part of this deterrence will be the public humiliation of the punishment i.e. the knowledge of the general public that a person has been convicted and punished. This, of course, presupposes that the public learns of the sentence, that it cares, and that it will be deterred by it (i.e. that general deterrence works). Mr. Justice Vancise of the Saskatchewan Court of Appeal in *McLeod* stated that general deterrence appears to have "a limited effect on criminal activity." It is the "likelihood of apprehension" that is important in reducing crime, not the length of incarceration:

That seems to suggest that society would be better served by directing more resources towards prevention and rehabilitation rather than building prisons to house people who are not in any way deterred by longer sentences.<sup>56</sup>

This approach is shared by Chief Justice Bayda. In *Horvath* he stated:

Numerous crime-control scholars, any number of academic writers and commissioners of inquiries into sentencing matters and even

some judges, have developed a rather robust skepticism about the validity of general deterrence as a sentencing objective...Parliament nevertheless in its recent legislation elected to include general deterrence as one of the objectives of sentencing.<sup>57</sup>

*Morrisette* sets out that both general and specific deterrence do not necessarily demand long periods of incarceration.<sup>58</sup> However, judges seem to equate deterrence with more severe sentences. If general deterrence was not a factor to be taken into consideration, the sentence would be lighter. It is almost an incremental approach.

In many traditional Aboriginal communities there is a form of general deterrence. It occurs through the knowledge that in a small community one's family and neighbours will certainly know of the offence. This can bring shame upon the offender and his or her family. In small, closely knit communities, the social mechanism of gossip can control behaviour. This would be especially true in communities or kin groups where the respect of others is important to the potential offender.

Generally speaking, all societies have some form of general deterrence so that offensive behaviour is discouraged. If there is a consequence for an action, and if people know about it, it will be recognized that some behaviour is not acceptable. In this sense, general deterrence serves to educate and socialize individuals within the 'community' (be it a family group, a sports team or a nation). General deterrence, in the context of criminal behaviour, raises the question of what works within the community (and do different deterrents work in different communities).

The Euro-Canadian approach to deterrence assumes that punishment must

be inflicted if there is to be deterrence. Very seldom is the criminal process itself (the public shame and humiliation) found to be sufficient punishment and deterrence. However, in Aboriginal communities, the public knowledge of one's conduct and having to face the victim and the community every day could be enough deterrence without punishment. The key to 'community' deterrence is that offenders have to care that others know of the conduct.<sup>59</sup> In the sentencing circle, the community takes part in the circle, recommends the sentence and knows the offender. These factors may favour the success of a sentence based on community sanctions or rehabilitation rather than one based strictly on punishment.

### **2.5.3 Protection of the Public**

The focus of the criminal justice system and one of the principles of sentencing is the protection of the public (as discussed throughout this Chapter). When determining a sentence, public protection is always of utmost importance. However, there will be offenders for whom public protection (i.e. the likelihood of reoffending) will not be a concern. Other principles such as general deterrence, denunciation, rehabilitation, punishment and disparity of sentences will have greater impact on determining the appropriate sentence. In such cases, the absence of concern for public protection may slightly mitigate the sentence, or may give support to the request for probation or a conditional sentence. More likely it will be disregarded.

In determining a sentence, the judge should be selecting the minimum sentence possible which will do justice to sentencing principles, including the

protection of the public. When considering the least onerous sanction or the possibility of a community based sentence, one of the judge's key concerns will be the protection of the public (i.e. is there a concern that the offender will re-offend if not incarcerated).

In *Morrisette* public protection was seen as being achieved by imposing a sentence which combines punishment, deterrence, and rehabilitation:

the public can best be protected by the imposition of sentences that punish the offender for the offence committed; that may deter him and others from committing such an offence and that may assist in his reformation and rehabilitation. If the offender is one for whom reformation is beyond question, then the public can be protected only by depriving him of his freedom.<sup>60</sup>

Accordingly, there can be two ways of looking at public protection: firstly, as the fact of the public being safe from further offensive behaviour by the offender and others; and secondly, by combining punishment, deterrence and rehabilitation into a sentence. These two are distinct and give rise to two different approaches to sentencing. The first is a subjective standard based on the particular offender in the particular circumstances. The second is an approach that is more concerned with the objective view of generally meeting sentencing goals so that public protection is achieved (i.e. some offenders will never re-offend yet they have to be incarcerated to achieve general deterrence, denunciation and punishment). The difference between these two approaches is the difference between a restorative approach and the current (retributive) approach to sentencing.

In dealing with the second approach as found in *Morrisette*, it can be argued that general and specific deterrence, punishment and denunciation are not reducing crime and therefore protecting the public. If that is true, then one must

consider other options. This would suggest that the most important principle to consider in achieving public protection is the reformation and rehabilitation of the offender (which is most closely aligned with the restorative approach to sentencing).

#### **2.5.4 Reformation and Rehabilitation of the Offender**

As a sentencing principle, the reformation and rehabilitation of the offender is often not given equal or greater weight than the other principles except in unusual circumstances. When reformation and rehabilitation are weighed against the principles of deterrence, denunciation, protection of the public and punishment, this often translates to the offender with the worst record and being the most in need of rehabilitation (to achieve specific and general deterrence and therefore, the protection of the public) being the least likely to benefit from sentences emphasising rehabilitation plans. This is so even though it is recognized that incarceration usually fails to achieve general and specific deterrence and therefore, the protection of the public.

Both rehabilitation and incapacitation (particularly in dangerous offender cases) deal with the behaviour of the individual and raise the question of whether forced treatment or confinement (beyond the usual term of incarceration) to avoid almost certain repetition of offences should be imposed upon an individual by society. Even if the reformation of the offender is best for the public, can it be imposed upon an unwilling offender? The sentencing circle is based on the offender being 'willing' and therefore this does not arise as an issue.

Specific deterrence can be very closely linked with rehabilitation, but rehabilitation plans may mean that a message to the public (general deterrence and denunciation) about unacceptable conduct will not be as strong. However, if there is no clear proof that general and specific deterrence and punishment actually work, the focus of sentencing should shift away from these principles to the principle of rehabilitation. If the offender is rehabilitated, the protection of society will be achieved. This would involve a massive shift in funding from the justice system to prevention and rehabilitation services. It would also involve a whole new way of looking at the criminal justice system. Such shifts in funding and philosophy are slow to happen.

The majority judgment of the Saskatchewan Court of Appeal in *R. v. Morin* dealt with the issue of rehabilitation in reviewing the sentence of the offender arrived at after a sentencing circle. It gives a very limited scope for the use of rehabilitation as a sentencing principle:

Since the sentence imposed on Mr. Morin clearly falls outside of the established range, it must be set aside on account of disparity, unless it can be shown that there are, in this particular case, reasons for putting rehabilitation ahead of the other factors considered in sentencing, or unless there are other extraordinary circumstances to justify departure from the normal range of sentences.

Rehabilitation is usually put ahead of other sentencing factors in cases of first offenders, young offenders, person with short or minor criminal records, and in cases of less serious offences. Once a person accumulates a substantial criminal record, protection of the public and the other sentencing factors are usually given more weight than rehabilitation when the offence is a serious one such as we have here...Mr. Morin...is someone with respect to whom the protection of the public should be given precedence over rehabilitation.<sup>61</sup>

### 2.5.5 Denunciation

Denunciation is the repudiation by society of the conduct of the offender and the stigmatization of both the offender and the offence as unacceptable or abhorrent. S.718(a) of the *Criminal Code* sets out denunciation of unlawful conduct as one of the objectives of sentencing.<sup>62</sup> Denunciation is often the focus of sentencing by the courts and by the public in horrific crimes or in crimes such as impaired driving, sexual, child and spousal assaults, and drug trafficking. If denunciation is the primary purpose of the sentence, the other sentencing principles and mitigating factors are not given what may have been the appropriate weight in another case. Therefore, denunciation can stand in the way of the rehabilitation of the offender. An offender who might never repeat the offence or who might be an excellent candidate for rehabilitation might receive a severe sentence for the purpose of effecting denunciation.

Public confidence in the administration of justice is an aspect of denunciation. Abhorrence of the crime must be reflected in the sentence, or the public will lose confidence in the justice system and its ability to uphold society's values. If public confidence demands that every drug trafficker be incarcerated, then rehabilitation will not be viewed as an important aspect of the sentence. Rather, denunciation and general and specific deterrence will be paramount.

The Saskatchewan Court of Appeal dealt with denunciation in the context of a sentencing circle in *Taylor*. In dealing with the issue of whether the sentence imposed after the sentencing circle was sufficient to denounce the actions of the offender, Chief Justice Bayda, in the majority decision, stated:



The sufficiency of the denunciation must be assessed primarily from the perspective of the community most affected by the sentence. That community is the same one that participated in the sentencing circle and made the recommendation the judge adopted...It is clear from the comments of the circle participants that they did not consider the banishment as a "letting off"...It is not unfair to infer that, for the community most affected and most concerned, the denunciatory effect of the time Mr. Taylor has spent in jail and in isolation is roughly the same as it would have been had he initially received a four-year term of imprisonment shortly after the offences occurred. Given this feature and having regard for the community's greater concern for restoration and healing, I am unable to find that the sentence in question suffers from a deficiency of denunciation. As D. A. Thomas pointed out, an individualized measure (a restorative approach) "may appear to diminish the gravity of the offence and weaken the deterrent effect of the law on potential offenders' but this apparent effect does not render the sentence "inappropriate or "[in]correct."<sup>63</sup>

This approach is more community-oriented. This orientation supports sentences arising from sentencing circles and a restorative justice approach as opposed to those fixated on starting point sentences and avoiding disparity.

### **2.5.6 The Problem of Sentence Disparity**

One of the major obstacles to the use of sentencing circles is the avoidance of sentence disparity. S.718.2(b) of the *Criminal Code* states that a sentence should be "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."<sup>64</sup> However, the Supreme Court of Canada in *Gardiner* sets out that it is the proper sentence for the offender, not for the offence that is to be considered.<sup>65</sup> Chief Justice Bayda, in his dissenting judgment in *Morin*, outlined the restorative approach to sentencing, which takes a different approach to the offender. He clearly stated that the restorative approach would result in

different sentences from those arrived at using the usual approach to sentencing (i.e. that in some cases, different sentences would be appropriate).<sup>66</sup>

One of the difficult issues raised when examining sentencing disparity is the effect of the sentence on the offender. A sentence imposed after a sentencing circle may seem to be 'lighter' than the usual sentence. However, if the effect of a restorative sentence is considered in terms of the personal cost and effort of the offender (in publicly admitting responsibility and in following a rehabilitative or restitution plan), it may be that the 'lighter' sentence is the more difficult one to fulfil. It might be easier to serve a sentence of incarceration and be done with the matter than to spend months or years following a rehabilitation plan and repairing the damage done to the community and victim.<sup>67</sup> Uniformity of sentences may be appropriate in some cases. However, all persons convicted of a particular offence or all persons with similar records should not receive the same sentence if there is to be any notion of justice. It is trite to say that a fine of \$1,000.00 for an affluent person does not have the same effect as it would upon an indigent person.

Similarly, a period of incarceration may serve no purpose for an offender who presents no danger to the public or who is ready to pursue a plan of rehabilitation. To incarcerate in such a case would do nothing other than to give effect to the principles of punishment, denunciation and general deterrence.

Principles of general and specific deterrence, based on national concerns and standards, may not be fair to Aboriginal offenders. For many Aboriginal offenders, their reality is their own community, not the whole of Canada. A sentence which might be seen as deterrence for a non-Aboriginal person living in

a large urban centre may be totally inappropriate for an Aboriginal person living in a remote reserve. What might be successful within an Aboriginal community might be seen as a very light and inappropriate sentence for a non-Aboriginal person in a large urban centre. As was stated in the Supreme Court decision in *M. (C.A.)*, the sentencing judge has the familiarity with the community to know the appropriate mix of sentencing principles:

This deferential standard of review has profound functional justifications...Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.<sup>68</sup>

This reasoning will have particular importance in the restorative justice approach of sentencing circles where the community is a key element of the appropriate sentence as well as of the process of arriving at the sentence.

The three recent decisions of the Supreme Court of Canada, *Shropshire*, *M. (C.A.)*, and *McDonnell*<sup>69</sup> give some hope that there will not be as great a reliance upon starting point sentences established by the courts of appeal and that more latitude will be given to the sentencing judge (to emphasize the rehabilitation of the offender or other sentencing principles, and the role and needs of the community). If the 'deferential' approach to the discretion of the sentencing judge is followed, the recommendations of participants at sentencing circles will more

likely be adopted by the sentencing judge and upheld on appeal. There will be more attention paid to the restorative approach to sentencing (as outlined by Chief Justice Bayda in his dissenting judgment in *Morin*<sup>70</sup>) and to the development of new approaches to sentencing. This will, however, give rise to more 'disparity' among sentences.

Chief Justice Bayda acknowledged in his dissenting judgment in *Morin* that his approach to sentencing circles gives rise to concern about disparity of sentences. He also acknowledged that sentencing circles would likely be used by Aboriginal offenders more often than by non-Aboriginals:

Is this apt to produce one system of justice for First Nations people and one for everyone else? I answer these concerns by pointing to the shocking disparity in the composition of the prison population of this province...Given that unhealthy scenario, the argument that the need to eliminate the disparity in sentencing as it is understood in the traditional sense must defer to the need to eliminate the disparity reflected in the composition of the prison population is compelling indeed...the deference does mean to recognize that our present justice system is flexible, accommodating and geared to do what must be done to achieve fairness and justice for all. That quality enables the system to embrace sentencing circles as part of the system and to ascribe to them a role in addressing the disparity in the prison population by empowering communities to help individuals break their personal cycles of misbehaviour. That accommodation not only respects the overarching principle of protection of the public into which all of the other sentencing principles are subsumed but enhances it. In that sense, the perpetuation of entrenched attitudes in relation to sentencing in the guise of maintaining sentence parity is not in the interests of the administration of justice in this province or the well-being of our society.<sup>71</sup>

The Saskatchewan Court of Appeal considered the issue of disparity (or the issue of parity) in *Taylor*. Chief Justice Bayda, in the majority judgment, relied on *M. (C.A.)* which stated that sentences will vary in different communities to some degree because the needs and conditions of the communities vary. He found that

Taylor's sentence did not result in disparity "particularly when one applies that principle with the caution and restraint contemplated by *M. (C.A.)*."<sup>72</sup> Chief Justice Bayda concluded:

In the present case "the needs and current conditions of and in the particular community [La Ronge] where the crime occurred" may be assumed to have been well known to the circle participants. That knowledge put them in the peculiar position of being able to fashion the "just and appropriate mix of accepted sentencing goals".<sup>73</sup>

He goes on to refer to the new sentencing provisions of the *Criminal Code*, s 718.(f) and 718.2(e), which promote responsibility of offenders and the particular circumstances of Aboriginal offenders: "Because of his ancestry, Parliament has directed that "particular attention" be given to the principle of restraint."<sup>74</sup> He concludes that:

for a trial judge to "vary" the sentence [from the norm] in order to accommodate that "mix of accepted sentencing goals" fashioned by the "particular community" is not a breach of the principle of parity as it has been refined and enunciated in *M. (C.A.)*.<sup>75</sup>

This judgment has opened the door for more acceptance of the recommendations of sentencing circles, although it remains to be seen how appeals will be dealt with in future cases in Saskatchewan. The Justices of the Saskatchewan Court of Appeal are split in their approaches to sentencing circles and the issue of disparity. In his dissenting judgment in *Taylor*, Mr. Justice Cameron found the sentence unfit on the basis of the principles of proportionality, parity, denunciation, deterrence and public confidence in the administration of the criminal law.<sup>76</sup> There was the same conflict in the decision in *Morin* between the dissenting and majority judgments. It would appear that Chief Justice Bayda and Justices Vancise, Lane and Jackson are receptive to change while the other

members of the Court (who are in the majority) are not as readily disposed to giving more weight to a new approach to sentencing.

## **2.6 INCARCERATION AS A SENTENCING TOOL**

The justice system has relied upon incarceration to deal with offenders who have committed serious crimes, who have been unable to rehabilitate themselves, or who have failed to pay fines. Canada utilizes incarceration at one of the highest rates among western nations, and yet crime is not decreasing.<sup>77</sup> Incarceration is not successful in deterring crime (i.e. it fails as general or specific deterrence).<sup>78</sup> It is extremely expensive and does little to rehabilitate offenders. Instead, it often exposes them to conditions and influences that reduce the possibility of successful reintegration into their communities.<sup>79</sup>

The purposes of a sentence of incarceration should be to incapacitate the offender from committing further offences for a period of time and more importantly, to provide an opportunity and a place for the offender to reform and rehabilitate. However, there is insufficient funding to carry on the type of counselling and educational training in our penal institutions that would assist in the rehabilitation of offenders and their reintegration into society. Prison life does not teach inmates responsibility, or prepare them to cope in society. It puts dysfunctional people in a poor environment and makes them dependent upon regulated prison structures.<sup>80</sup> Access to spiritual and healing processes in jails and prisons can assist Aboriginal offenders in rehabilitation. Although there is more programming in this area than in the past, much more needs to be done to assist

Aboriginal offenders.<sup>81</sup>

Aboriginal offenders are incarcerated at a rate far in excess of their proportion of the Canadian population.<sup>82</sup> Incarceration may be a subjectively different punishment for Aboriginal offenders than it is for non-Aboriginal offenders. For some Aboriginal people, incarceration may be a more onerous punishment than it is for non-Aboriginal people. This may be particularly true for people from remote northern communities, for young offenders, for women separated from their families, and for those for whom being locked up is totally foreign to their life on the trap line or in the community. Specific deterrence (if in fact it is effective) through jail may not have to be as long for Aboriginal people because it may be a greater hardship. Language may isolate Aboriginal peoples in prisons. Indoor living and different foods and facilities may be a deprivation not suffered by non-Aboriginal prisoners. Worry about family left without a provider and shame felt may make a jail sentence harder than it would be for a non-Aboriginal person.<sup>83</sup> These factors should be taken into account when considering a sentence of incarceration.<sup>84</sup> But, rather than considering these factors or questioning why it is necessary to incarcerate, there has been reliance upon starting point and other Court of Appeal sentencing guidelines which demand incarceration.

The recent amendments to the *Criminal Code* deal specifically with the issue of incarceration and Aboriginal offenders. S.718.2 (d) and (e) provide that:

- (d) An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.<sup>85</sup>

Sentencing judges should be considering these sections before imposing a sentence of incarceration. These sections of the *Code* will be of particular importance in conditional sentencing, community sanctions and in implementing the recommendations of sentencing circles. The sentencing circle can facilitate the use of alternatives to incarceration (or at least, lengthy incarceration) by recommending community-based sentences, rehabilitation plans, the involvement of victims and communities, and by providing the necessary mechanisms and community support. Yet there is resistance to moving beyond punitive sentencing to give the opportunity for growth of a new sentencing philosophy.

In his dissenting judgment in *Morin*, Chief Justice Bayda stated that the approach to sentencing should be different when viewed from a restorative justice paradigm (i.e. the paradigm of the sentencing circle) as contrasted to the “ordinary” (retributive/punitive) approach:

the sentence arrived at using the restorative approach will likely be quite different from the one arrived at using the ordinary approach. In the case of the restorative approach the incarceration component of a fit sentence will likely be less (or perhaps non-existent) than the incarceration component of a fit sentence arrived at using the ordinary approach. The explanation is that the success of the healing component in the restorative approach is often contingent upon a minimal incarceration period or no incarceration at all. That may not always be true but often it will be. Accordingly, to assess the fitness of a restorative sentence by comparing its incarceration component with the incarceration component of a fit sentence using the ordinary approach is to engage in an exercise that is either flawed or irrelevant.<sup>86</sup>



## 2.7 PROBATION AND CONDITIONAL SENTENCING

A judge has flexibility within the *Criminal Code* to provide community involvement in sentencing. Sentences which are more appropriate to Aboriginal cultures and circumstances can be created with the co-operation of the judiciary, counsel, enforcement officials and community representatives. Such sentences can have more potential for successful rehabilitation and deterrence than a sentence determined by current practices. Sentencing circles are one process which can assist the justice system and the community to accomplish this.

Community input into the terms of the sentence often results in some form of community service or reparation,<sup>87</sup> restitution or compensation to victims. The recommendations of a sentencing circle have usually been implemented through probation orders. Conditional sentences have been available since the 1996 amendments to the *Criminal Code* as another means to implement the rehabilitative sentences often recommended by circle participants.

Remission of sentence and parole do not apply to a conditional sentence or to the term of a probation order. Some of the conditions suggested at circles for conditional sentences or probation (such as electronic monitoring and banishment) can be very onerous. The nature of the sentence and the fact that there is no reduction in the time of the conditions are factors which must be considered when comparing sentences arrived at by the usual process and those recommended by a circle. When the effect upon the offender and other subjective factors of a restorative sentence are assessed, conditional sentences and terms of probation orders can often be viewed as being comparable to jail sentences.

## 2.8 CONCLUSION

Public perception of the sentencing process in general, and of sentencing circles in particular, is important. Public confidence in the justice system has been declining in recent years and public fear and demands for harsh penalties have increased. The public is demanding sentences which are effective, punitive and which prevent crime. Disparity and leniency in sentencing (particularly in favour of Aboriginal offenders and Young Offenders), is perceived by the public as a major problem. However, there is a gap between perception and reality: crime is actually relatively stable in contrast to the public perception that it is rising rapidly.<sup>88</sup>

It is important that offenders and their communities understand the goals of the justice system, the sentencing process, and the penalty imposed.<sup>89</sup> Many Aboriginal offenders do not have this understanding, and many of their communities feel isolated from the justice system and the sentencing process. A sentence will not be effective in an Aboriginal community if the community does not have confidence in the justice system and if the sentence is not culturally appropriate (and therefore, meaningful to the offender, victim and community).

There is an increasing awareness in Canada that the focus of the sentencing process should be on the individual and that there should be less concern for uniformity of sentences. One of the greatest obstacles to reform of the justice system and of sentencing practices is the notion of formal equality (one justice for all). The Law Reform Commission examined the impact of formal equality upon the sentencing process. It concluded that the principle of formal

equality could not be maintained for Aboriginal peoples in the criminal justice system because the identical treatment of all persons would serve only to enforce the value system of the dominant culture:

Identical treatment does not achieve equality in result. Consider, for example, sentencing: judges apply various factors in "fitting the sentence to the offender." Even when applied even-handedly, however, these factors themselves incorporate certain attitudes and necessarily cause unequal results.<sup>90</sup>

The Law Reform Commission came to the following conclusion:

Broadly speaking, we believe that criminal law and procedure should impose the same requirements on all members of society, whatever their private beliefs. However, we also feel that the distinct historical position of Aboriginal persons justifies departing from that general principle. As a general rule, all those coming to or residing in Canada should accept Canadian rules, and the outer limit of allowable behaviour should be set by the criminal law. However, the Aboriginal peoples did not come to Canada. Canada came to them. They have constitutional recognition and treaty rights that set them apart from all other Canadians.<sup>91</sup>

This perspective must be considered if there is to be reform of the justice system and of sentencing practices to provide fair and equitable treatment of Aboriginal peoples.

Among the issues which sentencing circles raise are the effectiveness of incarceration as a deterrent or rehabilitative tool, the principle of uniformity of sentences (disparity), the importance of rehabilitation of the offender, and the role of the community in deterrence and rehabilitation. Sentencing circles provide an opportunity to seek new directions in sentencing. They also address the relevance and effectiveness of the current approach to sentencing, to victims, and to the role of the community in the Saskatchewan justice process.

The primary focus of sentencing should become the protection of the public

through the reformation and rehabilitation of the offender coupled with a restoration of good relations between the offender and the victim. The problem, however, is whether there can be a shift in emphasis from punitive justice to restorative justice within the existing system and whether this is enough to meet the needs of Aboriginal peoples.

Protection of the public can best be achieved by the rehabilitation of the offender (provided that there is no danger to the victims and the community in the terms of a circle's recommendations for sentence). There is often greater potential for rehabilitation and reformation in the terms of a circle's recommendations than are found in a period of incarceration or the payment of a fine. Sentencing circles can be viewed as meeting the usual aims of sentencing and the aims of restorative justice if there is a broader view of punishment, denunciation, deterrence and disparity of sentences. The terms of a sentence imposed by community members at a sentencing circle may not involve incarceration. However, banishment and electronic monitoring can be more difficult and longer for an offender than the usual term of incarceration. The terms can also provide public exposure of the offender's conduct through community service which would provide punishment as well as both specific and general deterrence. Banishment can also provide very strong denunciation of the offensive conduct.

Public discussion of an offender's social, personal and addictions problems can be very difficult for an individual. In the usual sentencing hearing, the offender is not required to admit any problems or speak about them. He or she is not required to apologize or acknowledge the harm done to a victim. In the sentencing

circle, the offender is confronted by the victim and the community. This, together with the community input into the terms of the sentence, can instil a great deal of confidence in the administration of justice for a community that has hitherto been alienated from the Euro-Canadian justice system.

A more flexible and open approach should be taken when considering the recommendations of a sentencing circle. It may be possible to view the terms of such a sentence as being as effective, as harsh, and as inclusive of sentencing principles as the sentence arrived at after the usual sentencing hearing.

## ENDNOTES

1. H. Archibald Kaiser, "The *Criminal Code* of Canada: A Review Based on the Minister's Reference", *U.B.C. L. Rev.* Special Edition 1992, 41 at 122.

2. Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, Volume I, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991) 389 [hereinafter AJI].

3. *Criminal Code*, R.S.C. 1985, c. C-46, Part XXXIII-Sentencing.

4. *Ibid.*, s.742.1-742.7.

5. *Ibid.*

6. *Ibid.* S.717.(1) provides that alternative measures may be used "only if it is not inconsistent with the protection of society" and if a number of other conditions are met including that the alternative measures are appropriate "having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim": s.717.(1)(b). The offender must also accept "responsibility for the act or omission": s.717.(1)(e).

7. AJI, *supra* note 2 at 389.

8. For the view that sentencing discretion is limited see Ross Gordon Green, "Aboriginal Sentencing and Mediation Initiatives: The Sentencing Circle and Other Community Participation Models in Six Aboriginal Communities" (LL.M. Thesis, University of Manitoba, 1995, unpublished) at 52:

Yet, in reality, sentencing discretion is limited. Although many factors potentially enter into a sentencing decision, appellate court guidelines establish acceptable ranges of sentence for specific offences and significantly restrict discretion (footnote omitted).

However, at 55 Green notes that the Crown can play a role in expanding sentencing options:

Despite the limiting effects of appellate guidelines, many sentences rendered in northern Saskatchewan still appeared to be outside accepted appellate range for given offences. This may be explained by support for such sentences by Crown representatives which reduces the chance of appeal (footnotes omitted).

See also Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., *Continuing*

*Poundmaker and Riel's Quest*, (Saskatoon: Purich Publishing, 1994) 269 at 277-8 for the view that sentencing alternatives are limited.

9. Tim Quigley, "Postscript—Have We Gotten It Together Yet?" (paper to be published in *Continuing Poundmaker and Riel's Quest* (2nd ed., forthcoming) at 31-4 (of the manuscript) for a current assessment of the impact of conditional sentencing and incarceration for fine default. He concludes that jail admissions for fine defaults are down significantly in Saskatchewan and that there has been some reduction in incarceration due to conditional sentences.

10. *Ibid.* at 32-3. *Criminal Code*, s. 734-6 allows fines to be dealt with through fine option programs, as civil judgments and by cancellation or non-renewal of licenses (driver's licenses, etc.).

11. *R. v. Morrisette* (1970), 1 C.C.C. (2nd) 307 (Sask. C.A.).

12. *Criminal Code*, *supra* note 3.

13. *Ibid.* s.721; s. 43 *The Summary Offences Procedure Act*, S.S. 1990 c. S-63.1; s.14 *Young Offenders Act*, R.S.C. 1985 c. 110 (pre-disposition report).

14. However, at a sentencing circle, the community's and the victim's interests are also central to the circle's recommendations. This focus may put defence counsel in conflict with the traditional role of obtaining the best sentence for the client.

15. *Criminal Code*, *supra* note 3, s.722. The victim impact statement is a written statement prepared according to the program of the particular province. It describes the harm done to a victim or loss suffered as a result of an offence.

16. It seems that in a sentencing circle there is not so much a retrospective view of the offence, as there is a prospective approach to what can happen for the victim, the offender and their communities in the future. In a sentencing circle, it is more usual for the participants of the circle to accept the past as a fact and not as a factor in determining sentence. The circle may choose to look to the present and the future of the offender. The past is not entirely ignored but more weight is given to rehabilitation than incremental punishment or just deserts. In both the sentencing hearing and circle, the issue of remorse is important, as is participation in treatment and rehabilitation plans and compensation for victims. In the sentencing circle, there is not as strong a tendency to 'give up' on an offender as seems to be the case in the ordinary sentencing hearing (as evidenced by incarceration, lengthy sentences and incremental punishments).

17. However, in a sentencing circle, an offender with a long history of offences might be ready to change and may be given that opportunity rather than the usual sentence.

18. Chief Judge Heino Lilles of the Yukon Territorial Court has stated that each decision maker within the justice system has "a considerable amount of discretion" and that a decision made by one person can significantly affect the discretion exercised by another:

While discretion is an essential part of the administration of justice, it is often associated with disparity in treatment of individuals. Nowhere is discretion more evident than in the sentencing process. In every instance where discretion exists, the intrusion of bias is probable...Moreover, the objective information that is available may be misinterpreted where cultural values of the decision maker differ from those of the person about whom the decision is being made.

Leonard Mandamin, Dennis Callihoo, Albert Angus, and Marion Buller, "The Criminal Code and Aboriginal People", *U.B.C. L. Rev.*, *supra* note 1, 5 at 11 (quoting from *Justice on Trial*).

19. *R. v. Gardiner* (1982), 68 C.C.C. 2d 477 (S.C.C.) at 514.

20. *AJL*, *supra* note 2 at 392.

21. *Criminal Code*, *supra* note 3, s.718.2(d).

22. *Ibid.* s.718.2(e).

23. *Morrisette*, *supra* note 11 at 309.

24. *Criminal Code*, *supra* note 3.

25. *Ibid.*

26. *Morrisette*, *supra* note 11 at 309.

27. See Peter Martin, Q.C., "Sentencing - Principles, Pitfalls and Bill C-41" (Banff: Public Perceptions of the Administration of Justice Conference, 11-4 Oct. 1995) at 2:

Although these objectives are self-explanatory, they are the source of some confusion because Culliton, C.J. identified protection of the public as one of four goals, leaving the impression that all are roughly equal. With respect, that is not so. Rather, it is submitted that protection of the public is the paramount objective of all sentences and the other goals are simply means by which that primary objective may be achieved. For example, if deterrence is stressed in the imposition of a sentence, the objective is to persuade the offender and others who may think like him/her not to yield to the temptation to commit the offence. By meeting this goal the public is protected. Similarly, where a sentence is imposed which is designed to rehabilitate the offender, the attainment of that objective will also



protect the public.

Another sentencing goal has recently emerged which is closely allied to punishment, and that is denunciation.

28. *Morrisette*, *supra* note 11 at 309.
29. *R. v. McLeod* (1993), 81 C.C.C. (3) 83 (Sask. C.A.) at 92.
30. *Morrisette*, *supra* note 11 at 311.
31. *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.) at 210.
32. *Ibid.*
33. *Ibid.* (adopting *R. v. Pepin* (1990), 57 C.C.C. (3d) 355 (N.S.C.A.) 373).
34. *Ibid.* (adopting *R. v. Muise* (1994), 94 C.C.C. (3d) 119 (N.S.C.A.) 124).
35. *R. v. M. (C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.) 374.
36. *Ibid.*
37. *Ibid.* at 375.
38. *Ibid.*
39. *R. v. McDonnell* (1997), 6 C.R. (5<sup>th</sup>) 231 (S.C.C.) 236.
40. *Ibid.* at 246-7.
41. *Ibid.* at 254.
42. *R. v. Taylor*, #6896, 18 Dec. 1997 (Sask. C.A.).
43. *R. v. Horvath* (1997), 152 Sask. R. 276 (Sask. C.A.) 285.
44. *Morrisette*, *supra* note 11 at 310.
45. Henry Campbell Black M.A., *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990) at 1317.
46. *Webster's Third International Dictionary* (Springfield, Mass.: Merriam-Webster Inc., 1986) at 2540.
47. *Ibid.* at 611.

48. *Ibid.* at 801.
49. *M. (C.A.)*, *supra* note 35 at 368-9.
50. *Criminal Code*, *supra* note 3.
51. *Horvath*, *supra* note 43 at 288.
52. *AJL*, *supra* note 2 at 394-5.
53. *Morrisette*, *supra* note 11 at 310.
54. See Jean-Paul Brodeur, *Justice For The Cree: Policing and Alternative Dispute Resolution* (The Grand Council of the Crees (Quebec), Cree Regional Authority, September 1991) at 40:  
The basic principle of deterrence is that it is the certainty of punishment rather than its severity that deters the offender. Once an offender has been apprehended and convicted, the most tangible form of the certainty of his or her punishment rests with the swift determination of the sentence. If a long delay separates the crime and its punishment, the certainty of punishment is completely undermined.
55. *Morrisette*, *supra* note 11 at 310.
56. *McLeod*, *supra* note 29 at 95.
57. *Horvath*, *supra* note 43 at 291.
58. *Morrisette*, *supra* note 11 at 310.
59. Rupert Ross, "Leaving Our White Eyes Behind: The Sentencing of the Native Accused", in Robert A. Silverman and Marianne O. Nielsen, eds., *Aboriginal Peoples and Canadian Criminal Justice* (Toronto: Harcourt Brace & Company, 1992) 145 at 151-2 where he discusses deterrence and the importance of gossip and shame in Aboriginal communities.
60. *Morrisette*, *supra* note 11 at 311.
61. *R. v. Morin*, [1995] 9 W.W.R. 696 (Sask. C.A.) at 710.
62. *Criminal Code*, *supra* note 3.
63. *Taylor*, *supra* note 42 at 38-9.

64. *Criminal Code*, *supra* note 3.

65. *Gardiner*, *supra* note 19 at 514.

66. *Morin*, *supra* note 61 at 729.

67. However, the public reaction and the Crown reaction to 'lenient' sentences recommended by sentencing circles is often that it is not fair that the Aboriginal offender gets off with a 'lighter' sentence than a non-Aboriginal offender in similar circumstances. For example, the case of *R.v.Rope*, [1995] 2 C.N.L.R. 209 (Q.B.); [1995] 4 C.N.L.R. 98 (Sask. C.A.) was criticized by the public and appealed by the Crown because an Aboriginal offender was not jailed after he had killed his father while driving impaired. The Crown and the public felt that an Aboriginal offender should be held to the same standard of accountability and face the same jail sentence as in a normal sentencing. The fact that the conduct of the offender was before his community, the victims were his own father and family, and the terms of probation included speaking to children about drinking and driving, did not equate the sentence with a jail term in the minds of many people.

68. *M. (C.A.)*, *supra* note 35 at 374-5.

69. *Shropshire*, *supra* note 31; *M.(C.A.)*, *supra* note 35; *McDonnell*, *supra* note 39.

70. *Morin*, *supra* note 61 at 729-36.

71. *Ibid.* at 729-31

72. *Taylor*, *supra* note 42 at 41.

73. *Ibid.*

74. *Ibid.*

75. *Ibid.*

76. *Ibid.* at 1-39.

77. *AJI*, *supra* note 2 at 392.

78. *Ibid.* at 394.

79. *Ibid.* The AJI recommended that incarceration should be used only as a last resort, in circumstances where there is a threat to the safety of an individual or the community, where the crime is too serious to warrant any other penalty, or where the offender refuses to comply with the terms of sentences imposed.

80. *Ibid.* at 359.

81. S. 83 *Corrections and Conditional Release Act*, S.C., 1992, C-20 recognizes Aboriginal spiritual programs. The Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice-Equality, Respect and the Search for Justice*, Report 34, (Ottawa: Law Reform Commission of Canada, 1991) at 83 [hereinafter Law Reform Commission] states:

Family, community, culture and spirituality are significant to the rehabilitation of all offenders. However, while for most non-Aboriginal offenders prison does not mean incarceration in a foreign cultural milieu, for many Aboriginal offenders it does. Thus, it is important to the rehabilitation of Aboriginal offenders that they be located as near as possible to their communities, to have access to families, Elders and community support.

82. Chapter One, *supra* at 5.

83. Ross, *supra* note 59 at 155-6.

84. See *R. v. Fireman* (1971), 4 C.C.C. (2d) 82 (Ont. C.A.). In the recent case of *R. v. F. (A.)* (1995), 35 C.R. (4<sup>th</sup>) 62 (Ont. Ct. Just.), the Court concluded at 67:

a sentence of imprisonment is for most aboriginal peoples far more difficult than a similar sentence for many other non-native Canadians...I am mindful of the fact that F.(A.) has seldom ventured out of the community...he will either have great difficulty, or it will be impossible for him to communicate in English...any imprisonment will produce a loneliness that is far greater than any sense of loneliness he may have experienced in isolation in the wilderness.

85. *Criminal Code*, *supra* note 3.

86. *Morin*, *supra* note 61 at 729.

87. Reparation: "payment for an injury or damage; redress for a wrong done": Black, *supra* note 45, at 1298.

88. The Honourable Allan Rock, Minister, Department of Justice, Ottawa, Address, Banff: Public Perception of the Administration of Justice Conference, 13 October, 1995.

89. See generally, Bradford Morse and L. Lock, "Native Inmate Views on Incarceration", *Aboriginal Peoples and Canadian Criminal Justice*, Silverman and Nielsen, eds., *supra* note 59, 187.

90. Law Reform Commission, *supra* note 81 at 10.

91. *Ibid.* at 14-15.

## CHAPTER THREE

### THE SENTENCING CIRCLE

#### 3.1 INTRODUCTION

The sentencing circle has been used in various jurisdictions across Canada. In Saskatchewan, circles have been held frequently in the north, in rural reserves, and there have been several circles held in urban centres, the first being the case of *R. v. Morin*<sup>1</sup> in Saskatoon. Sentencing circles, by their very nature, should be a community initiative. However, in Saskatchewan they were initiated in the north by provincial court judges who were frustrated with the ineffectiveness of the criminal process. Judge Fafard described the process as "sausage factory" justice.<sup>2</sup> He felt he was merely processing an endless stream of northern offenders without satisfactory results. The existing justice system was not providing effective solutions to the problems of Aboriginal offenders, nor did it keep them from reoffending. Inspired by the case of *R. v. Moses*,<sup>3</sup> Judge Fafard held the first sentencing circle in Saskatchewan in the community of Sandy Bay in 1992.<sup>4</sup>

#### 3.2 FORMAT OF A SENTENCING CIRCLE

Following a guilty plea or a conviction, the offender, his or her counsel, or the Crown may make an application for a sentencing circle to the trial judge. Sometimes the judge may suggest a sentencing circle. The request for a circle

may be viewed as being similar to the request and order for a pre-sentence report and therefore, either of the counsel or the judge can raise the issue.<sup>5</sup> The judge has the discretion to decide whether a circle will be held.<sup>6</sup>

If a judge grants a sentencing circle, the case is adjourned to allow time to assemble the circle participants. Sometimes the offender will develop a rehabilitation plan with the community. There are no hard and fast rules for who sets up a circle, who should be asked to participate, how many people should be involved, or what the role of the participants will be. Generally, enforcement officers, the prosecutor, defence counsel or justice officials will work with members of the community to assemble the circle participants (although a circle has been set up by an offender alone<sup>7</sup>). Some communities have local justice committees which handle sentencing circles and which may advise the judge whether the case is suitable for a circle. Chief Justice Bayda, in his dissenting judgment in the Saskatchewan Court of Appeal in *Morin*, made the following comments on the establishment of a sentencing circle:

The establishment and conduct of the circle should be under the aegis of the judge. On directing that a sentencing circle be held the judge should indicate the manner in which he or she proposes to establish the circle and the categories of persons who should constitute the circle. The judge should give an opportunity to the Crown and the accused and their counsel together with representatives of the community in question - a number of whom presumably will, at that point, have made themselves known to the judge - to make representations respecting the persons who should constitute the circle and the manner in which it ought to be established. After hearing their representations, the judge should make a decision in this respect and should rely upon his support staff to implement that decision.

The location of the sentencing circle proceedings should, in most cases, coincide with the place of the trial. The rule however should

not be an inflexible one. Cases may arise where factors such as the location of the relevant community, the need for the victim to be present and so on, may dictate that the sentencing circle, if it is to be held at all or if it is to be effective, should be held in a place other than the place of the trial. That is an issue that, too, may need to be resolved by legislators and interested parties or by judges deciding the issue on a case by case basis.

The actual conduct of the circle should be in the control of the judge. But in exercising that control he or she should be sensitive to the cultural tenets and customs of the community in question. It is good sense to make whatever accommodations are necessary, within reason, to make the circle as effective as it possibly can be.<sup>8</sup>

Chief Justice Bayda, in the majority decision in *R. v. Taylor*<sup>9</sup> found that the trial judge had been in error in failing to follow the procedure for sentencing circles that has been developed in the Provincial Court in Saskatchewan (and particularly in La Ronge where the circle was held). The trial judge should have referred the offender's request for a sentencing circle to the local justice committee which would have investigated whether the case was suitable for a circle. The committee would have made a recommendation to the judge. Chief Justice Bayda found that the failure to make this reference, together with the summary manner in which the trial judge considered whether the offender was a suitable candidate for a circle, would normally have resulted in a fatal error in the sentencing circle. However, because the circle participants gave consideration to the offender's remorse, sincerity and his acceptance of responsibility for his actions, the error was not fatal to the circle.<sup>10</sup>

Sentencing circles usually follow the format set out in *Moses*.<sup>11</sup> The circle is held in a more informal setting and with more relaxed procedure than the usual sentencing hearing.<sup>12</sup> The circle may be held in a courtroom, a band hall, or in any



other location that is agreed to by the parties or suggested by the court. There is often both an inner and an outer circle. The inner circle is composed of those persons who are going to be directly involved in the discussions. Chairs can be placed in an outer circle or around the room for those who wish to observe. Often those in the outer circle will speak if they are asked to and choose to do so.

The circle participants are usually the judge, offenders and their families, victims and their families and support group, Crown and defence counsel, Elders, probation officers, court workers, parole officers, community workers, counselling personnel, police officers, and representatives of the community.<sup>13</sup> The court clerk sometimes sits in the inner circle.

Traditionally, there were no special powers or authority in the Aboriginal circle: the equality of its participants was fundamental.<sup>14</sup> This principle is honoured to some extent in a sentencing circle in that all participants are given an equal opportunity to speak. However, the judge makes the final decision on the sentence and has the sole sentencing power. The judge usually assumes the role of the chairperson of the circle (although sometimes a community member will do so). In some circles, a 'talking stick' or an object is passed to the speaker. This is an Aboriginal tradition, which indicates that the speaker is to be respected and should not be interrupted.<sup>15</sup>

A sentencing circle is held in open court. The judge will usually advise the participants that the circle is a court proceeding and will open court. In *Moses*, Stuart J. indicated that sensitive matters may be heard in closed court:

In most cases there will be no need to limit access. However, where

clear advantages flow from a closed session, the long standing reasons for open court must be dusted off and re-examined in light of the advantages derived from acquiring extremely sensitive and personal information from offenders, victims or their families and friends.<sup>16</sup>

The proceedings are usually recorded. However, the issue of whether parts of the transcript of the circle could be confidential was also raised in *Moses*:

In some cases there are good reasons to question why a transcript embracing all circle discussions is necessary. Some aspects of the discussion may be best excluded from the transcript, or where the circle is closed to the public, the transcript retained in a confidential manner, available only if required by a court of appeal.<sup>17</sup>

In his dissenting judgment, Chief Justice Bayda in *Morin* commented on transcripts:

The judge should give consideration to the matter of a transcript of the circle proceedings. The reason for a transcript is basic. Should the matter proceed to appeal, a transcript is the best and most accurate method to inform the appellate judges of the proceedings. Accordingly, if there is no objection by the community representatives on the circle to a recording and transcription of the proceedings, the judge through his support staff should make the necessary arrangements. If, however, there is serious objection to such a recording and transcription the sentencing circle should proceed in any event without arrangements for a transcript. In that case it is incumbent on the judge to summarize the proceedings in his or her reasons for judgment. Those reasons as well as any notes made by the judge during the proceedings should be made available to the appellate court in the event of an appeal.<sup>18</sup>

The judge will usually ask an Elder to open with a prayer and will advise the participants how the circle will proceed in terms of the order of speaking, whether a recording will be made, translation facilities and so on. There is agreement about the facts of the case and the record of the accused prior to the commencement of the circle. If, however, an issue arises which requires evidence to be given, the

circle would have to be adjourned and formal court proceedings resumed to hear evidence under oath. Upon completion of the evidence, the circle would resume. The accused must be asked if he or she has anything to say and both counsel are asked for submissions in compliance with s.723 and s.726 respectively, of the *Criminal Code*.<sup>19</sup> Translation should be provided when necessary. However, this can be a problem and often a member of the circle or the community will be asked to translate.<sup>20</sup>

Often, the judge will remove the court gown after opening court or may not wear it at all. Sometimes the judge's position is clearly dominant. Sometimes the circle is truly a circle and the judge's chair or table has no prominence. Sometimes the Crown and defence counsel will be placed, as in *Moses*,<sup>21</sup> to the right and left, respectively, of the judge, and other times, they will merely assume a chair in the circle. Defence counsel will sit with the accused and often, the family. In some communities, a justice committee may oversee sentencing circles, and there may be formalized guidelines for their procedure.<sup>22</sup>

The judge usually explains the role the participants will play and how the circle is expected to proceed.<sup>23</sup> The judge will indicate the offence(s) for which the offender is to be sentenced, and will explain that the offender has pleaded guilty or has been found guilty of the offence(s). The judge may set out the range of sentence required by the *Criminal Code*, and may state what the sentence might be in similar circumstances or if sentencing was proceeding without the assistance of the circle. Sometimes the judge will indicate the highest sentence the accused would receive.<sup>24</sup>

The role of the prosecutor can vary greatly. At the sentencing circle in *Morin*, the prosecutor took a clearly adversarial position, asked for the standard sentence (lengthy incarceration) and beyond presenting the usual facts and sentencing submission, did not participate in the circle discussions.<sup>25</sup> In other cases, prosecutors have limited themselves to a recitation of agreed facts and a sentence submission.<sup>26</sup> In other cases they have said nothing.<sup>27</sup>

Stuart, J. in *Moses*, stated that the roles of Crown and defence counsel were maintained in a sentencing circle. He stated that the circle process gave the community an opportunity to become aware of the interests of the state in sentencing. It gave Crown counsel an opportunity to gain a greater understanding of the interests of the community.<sup>28</sup>

However, if an important focus of the sentencing circle is the interest of the victim and the community, are the roles of counsel compromised? It would seem that Crown counsel maintains its role in representing the interests of the state (as seen by appeals from circle decisions). However, defence counsel may be caught between what is best for the offender, and what is best for the victim and the community. This is a conflict between finding the best sentence in a restorative sense, and the best sentence for the offender (in this context 'best sentence' equates with lightest, not with what is best for the offender in terms of rehabilitation).

The offender and the victim are given the opportunity to speak and all members of the circle are asked to participate in the group discussion. The circle participants are not under oath.<sup>29</sup> The participants discuss the offence and its

effect upon the victim and the community. They talk about the offender, what might have led to the commission of the offence, how to heal the damage to the victim and the community, and how to assist in the offender's rehabilitation. Many matters that are not revealed in a normal sentencing hearing are raised by the participants (family history, revelations of childhood abuse, admissions of addictions and social problems and so on). The circle process often gives the offender the opportunity to hear that family and community support are available. In many cases, the participants are able to achieve a clear consensus about a rehabilitation plan and an appropriate sentence.

The manner in which the circle proceeds can depend upon the attitude of Crown counsel and whether the proceedings have an adversarial atmosphere in which the Crown or the victim may want a severe sentence while the offender and his or her community may want to pursue rehabilitation. Chief Justice Bayda in *Taylor* described the transformation of the sentencing circle from one that was clearly divided into one in which the participants developed a consensus. In this case, he found that the key to reaching the consensus was the proposal to banish the offender from the community as well as the dynamics of the circle process.<sup>30</sup>

In some cases, the judge may have to take an active role in the management of the circle if participants need encouragement to speak or if there is an adversarial nature which requires direction. In theory, however, the matter should run without direction or interference, and the community should control the discussion.<sup>31</sup>

The background of the offender and the factors which led to the offensive

behaviour are often examined and discussed with frank (and by Euro-Canadian standards, brutal) honesty. The roles in the offence and in the life of the offender of all the participants of the circle (including the offender's family, the community, and the victim and family) are often examined. The victim and family or support group can tell the offender, face to face, what impact the crime has had. The offender has to face the true consequences of his or her actions, something that usually does not happen in the ordinary sentencing hearing. In turn, the offender can be seen and heard as a person, within the context of his or her background and family life, not just as a criminal. The victim may develop sympathy for the offender and may change from wanting revenge or punishment, to wanting to help in the rehabilitation plan. Often the offence itself becomes secondary to the personal circumstances of the offender.<sup>32</sup> The circle can provide a new perspective:

The sentencing circle offers a change in focus when viewing the offender. Instead of looking back to the CCJS [Canadian Criminal Justice System] score card and penalizing for even having such a history, the sentencing circle looks back to unearth any psychological, emotional or social problems then looks ahead to a more positive way to deal with those problems. The concern becomes a healing process and energy is put into restoring the worth of the person, first within themselves, then within the community.<sup>33</sup>

The judge has overriding authority within the circle and makes the determination of the sentence. He or she is bound by the provisions of the *Criminal Code* and the sentencing guidelines of the Court of Appeal.<sup>34</sup> The judge usually follows the recommendations of the circle, particularly where a consensus has been reached. If the judge deviates from the circle's recommendations, he or she

will explain why and will explain the nature of the sentence to the offender and the circle.

### **3.3 THE SIGNIFICANCE OF THE CIRCLE**

The concept and the process of the circle in Aboriginal traditions is the foundation of the sentencing circle. In many Aboriginal communities, a circle of community members was used as both the forum and the process for discussions, decision-making, dispute resolution, counselling, and healing.<sup>35</sup> In some communities there were two types of circles: the talking circle and the healing (or counselling) circle. The talking circle was used for community discussions, decision-making and dispute resolution. The equality of the participants and the respect shown to the speaker were key elements of the talking circle. In contrast, the healing or counselling circle was used to help community members who were experiencing personal difficulties or conflict with others. In the healing circle, they could receive counselling and the guidance of Elders. The confidentiality of the parties in the healing circle was essential (which runs counter to the Euro-Canadian principles of open court).<sup>36</sup>

It may be difficult to establish a link between the traditional use of the circle and the sentencing circle as used in Saskatchewan and other jurisdictions. The sentencing circle is being used in some Inuit communities, even though there is clearly no connection to Inuit tradition.<sup>37</sup> However, there are similarities between the sentencing circle and the traditions of various Aboriginal peoples, including the importance of the circle, the consensual and community decision-making

processes, the importance of healing the individual and the need for harmony within the community.

The circle setting is being used today as a forum for discussion in Aboriginal, non-Aboriginal and in mixed settings and is being acknowledged as a valuable aid to discussion and decision-making. The circle was described to the Royal Commission on Aboriginal Peoples [hereinafter RCAP] as a "very powerful tool, very powerful, because you don't feel you're being picked on. You feel you're being supported."<sup>38</sup>

The justice system has borrowed the Aboriginal traditions of the talking and healing circles and has inserted them into the judicial process at the point of the sentencing hearing. The sentencing circle itself is not an Aboriginal tradition.<sup>39</sup> The term 'sentencing circle' is a contradiction in terms as the process of 'sentencing' an offender is not an Aboriginal practice. Although punishments could be handed out by the community, sentencing was not the focus of dispute resolution nor was it seen as a solution to individual or community problems. The circle represented a safe place for discussion, conflict resolution, and healing. It was not a place of punishment.<sup>40</sup> Some view a sentencing circle as a sentencing hearing involving the community. Others equate it with a pre-sentence report, in which information is gathered for the use of the judge, who then determines the sentence.<sup>41</sup> This was the approach taken by the trial judge in *Taylor*. However, in the Saskatchewan Court of Appeal, Chief Justice Bayda rejected that reasoning:

A sentencing circle is much more than a fact-finding exercise with an aboriginal twist. While it may and does serve as a tool in assisting the judge to fashion a "fit" sentence, and in that respect serves much



the same purpose as a pre-sentence report, a sentencing circle transcends that purpose. It is a stock-taking and accountability exercise not only on the part of the offender but on the part of the community that produced the offender. The exercise is conducted at a quintessentially human level with all interested parties in juxtaposition speaking face to face, informally, with little or no regard to legal status, as opposed to a clinical, formal level where only those parties with legal status participate and only at their respective traditional physical, cultural and ceremonial distances from each other. The exercise permits not only a release of information but a purging of feelings, a paving of the way for new growth, and a reconciliation between the offender and those he or she has hurt. The community to which the offender has accounted assumes an authority over and responsibility for the offender – an authority normally entrusted to professional public officials to whom the offender does not feel accountable. All of this is subsumed in the term “healing” so often used by aboriginal circle participants. The notion of healing, as Crown counsel has intimated, is at the centre of the circle restorative approach.<sup>42</sup>

From either perspective, it is still a process within the existing justice system and the judge, not the community, makes the final decision on sentence.

In terms of its relationship to Aboriginal circles, the sentencing circle can be viewed as a combination of the talking and healing circles. It is a community discussion focussed on rehabilitating the offender and healing the damage done to the victim and the community. Counselling or healing can take place after the sentencing circle, but the process can be initiated through community commitment to the offender in the sentencing circle.<sup>43</sup>

A sentencing circle approaches the offender and the sentence differently from an ordinary sentencing hearing, and usually results in a different sentence. In his dissenting judgment in *Morin*, Chief Justice Bayda describes the current approach to sentencing as retributive and the approach in a sentencing circle as restorative.<sup>44</sup> In the majority decision, Mr. Justice Sherstobitoff acknowledged that

sentences arrived at with the use of sentencing circles will most likely differ from those arrived at by the ordinary sentencing hearing. He relied on the seventh criterion for holding a circle as outlined in *R. v. Joseyounen*: "the case must be one in which a court is justified in taking a calculated risk and departing from the usual range of sentencing."<sup>45</sup> The dissenting judgment of Chief Justice Bayda in *Morin* takes a very different approach:

the factors that a judge ought to consider at this stage of the proceedings are those that will enable him or her to answer this critical question: Is a fit sentence for *this* accused who has committed *this* offence better arrived at by using the restorative approach or the ordinary approach? In considering this question the judge will have to keep in mind that the sentence arrived at using the restorative approach will likely be quite different from the one arrived at using the ordinary approach [emphasis in original].<sup>46</sup>

We have two different approaches from the Court of Appeal, one being a "calculated risk" approach and the other being a "restorative" approach.

The seven criteria developed by the Provincial Court judges in northern Saskatchewan and used by them in deciding whether or not to hold a sentencing circle were enunciated by Judge Fafard in *Joseyounen*:

- (1) The accused must agree to be referred to the sentencing circle.
- (2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
- (3) That there are elders or respected non-political community leaders willing to participate.
- (4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
- (5) The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counselling made available to her and be accompanied by a support team in the circle.
- (6) Disputed facts have been resolved in advance.
- (7) The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.<sup>47</sup>

These criteria provide a guideline for the use of sentencing circles in Saskatchewan.

### **3.4 SHAME AS A COMMUNITY DYNAMIC**

The dynamics of the sentencing circle are linked strongly to the role of shame in community control and dispute resolution. A person's relationship with kin groups, with Elders, and with the community as a whole was very important in traditional Aboriginal communities. The threat that shame would be brought upon an individual and the family was a powerful deterrent to deviant behaviour.<sup>48</sup> Metis communities brought offenders before the community where their behaviour was discussed. Community leaders and Elders would lecture and reprimand them. This was a significant deterrent to repetition of offensive conduct.<sup>49</sup>

There is growing recognition today of the role of personal shame in community control over deviant behaviour.<sup>50</sup> In a society that has strong, interdependent relationships among individuals, a person who has offended laws or customs can be reintegrated into the community by the shaming process. There is an important distinction to be made between the stigmatization of an offender in the Euro-Canadian justice system (i.e. the branding of the offender as 'criminal'), which is very difficult to overcome, and the reintegration of the offender into the community (i.e. by making amends and healing themselves and the community) as is done in many Aboriginal communities. If an offender is shamed by his or her community and then works to heal the damage, he or she is then accepted back

as a valuable member of that community.

The higher the level of interpersonal relationship and dependency, the greater will be the role of shame in social patterns, and the lower the rate of crime. If sanctions are imposed by those people who are important to the offender, they will be more effective than if imposed by a remote authoritarian figure.<sup>51</sup> Hence the potential for an effective sentence is greater in a sentencing circle attended by family and friends than for one imposed by a circuit court or by a judge not known to the offender or the community. This was recognized in *Moses*:

There is a significantly different sting to a punishment imposed by a community, than to a similar sentence imposed by a circuit court judge. The circuit court judge is a stranger...The shame and embarrassment of the few moments of sentencing by the judge quickly dissipates.

Punished by a community the offender must face his sentencers daily. Punished by a court the offender confronts the disapproval of a stranger, enforcing strange laws whose punishment carries the authority of the State. Punished by the community the offender faces the disapproval of his neighbours, friends, and of those within his most immediate environment whose punishment carries the authority of a consensus within the community.<sup>52</sup>

Traditional deterrence in Aboriginal communities has been undermined and in most communities is no longer adequate or effective in controlling deviant behaviour. The disruption of the traditional life of Aboriginal communities has caused moral codes of conduct, respect, and the dispute resolution processes to break down. Group survival is not the key to Aboriginal existence today as it was traditionally, nor are shame and the threat of banishment as effective in controlling deviant behaviour.<sup>53</sup> Justice initiatives which restore traditional deterrence and community control through shame and peer dynamics should be encouraged to

take advantage of these community dynamics. Probation orders with community work can be effective because there is public exposure of the offender and the offensive conduct.<sup>54</sup> Many Aboriginal communities and nations are attempting to deal with community problems by restoring traditional processes.<sup>55</sup> The use of sentencing circles is part of the process of restoring the role of the community in dealing with deviant behaviour.

### **3.5 THE PURPOSE AND BENEFITS OF A SENTENCING CIRCLE**

In beginning his reasons for judgment in *Moses*, Stuart, J. emphasized the importance of the 'process' involved in sentencing an offender:

Many might debate the extent any decision-making process shapes the result, but indisputably process can be as determinative as content. In sentencing, process profoundly influences the result. The process influences, not just what, and how matters are addressed, but who participates and what impact each person has in shaping the final decision.<sup>56</sup>

The 'process' in many instances may be the most important part of the sentencing circle. The gathering of the offender, the victim, their families and communities and the ensuing discussions may be the factor that makes the rehabilitation of the offender and the healing of the victim possible. The sentencing circle can provide the process and the forum to explore unique sentencing options that will assist in the rehabilitation of the offender and reflect the culture of the community.

The majority judgment of Mr. Justice Sherstobitoff in *Morin* commented on Aboriginal culture and the purpose of a sentencing circle:

The very purpose of sentencing circles seems to be to fashion sentences that will differ in some mix or measure from those which the courts have up to now imposed in order to take into account aboriginal culture and traditions, and in order to permit and to take into account direct community participation in both imposition and administration of the sentence. It also seems implicit in all discussions of sentencing circles that they will in many cases, if not most of them, recommend sentences imposing lesser terms of incarceration than would have been imposed by a judge alone and to substitute alternative sanctions, usually involving the community in the administration of those sanctions.<sup>57</sup>

The physical setting of the circle changes the roles of the participants, as well as the "focus, tone, content and scope of discussions."<sup>58</sup> The circle can create a more constructive atmosphere than the courtroom. In *Moses*, Stuart J. found that the monopoly of the professional players in the process (the judges and lawyers) and the reliance upon legal and technical language were broken. All of the circle participants were involved in the discussions and recommendations for sentencing.<sup>59</sup>

Community involvement in a sentencing circle gives the opportunity to understand the limitations of the justice system. Stuart J. indicated that the justice system is relied upon too heavily and that the community should become involved in its problems and dispute resolution.<sup>60</sup> The sentencing circle can also force an examination of the causes of the crime and "what characteristics in the community precipitate crime, what should be done to prevent crime, and what could be done to rehabilitate offenders."<sup>61</sup> This in turn can mobilize community resources to deal with factors within the community that can influence criminal behaviour and recidivism. It can help direct community efforts and community participation in solutions. It can create a less adversarial means of processing conflict and help to

develop a partnership between the justice system and Aboriginal communities.

It is interesting to note that RCAP came to a very similar conclusion in discussing family group conferences held in New Zealand and Australia:

although family group conferences reflect Maori concepts of restorative justice, incorporation of this process into the juvenile justice system has been received favourably by non-Maori communities in New Zealand. The reasons seem to be that the process breaks the control of professionals, empowers the community, particularly victims, and is oriented to flexible community problem solving.<sup>62</sup>

It is important to note that the concept of 'taking responsibility' is central in the discussions about sentencing circles and in the role of the offender and community in the circle and healing processes. The 1996 amendments to the *Criminal Code* include as one of the objectives of sentencing: "to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community."<sup>63</sup> The sentencing circle process involves the offender taking responsibility for his or her actions. It also involves the community taking responsibility for the conditions which lead its members to become involved in offensive conduct. It examines whether the victim has some responsibility for the offence. It involves the offender's family in taking responsibility for its role in the offender's conduct. The community also has a role in taking responsibility for the healing and rehabilitation of the offender, the victim and the community.

### **3.6 ISSUES RAISED BY THE USE OF SENTENCING CIRCLES**

#### **3.6.1 Introduction**

Sentencing circles have been carried out within the existing justice system with the co-operation of the judiciary. The Saskatchewan Court of Appeal affirmed the use of sentencing circles in Saskatchewan in *Morin*.<sup>64</sup> However, the use of sentencing circles has raised many questions. There are no strict rules for when a sentencing circle should be held. The majority judgment of the Saskatchewan Court of Appeal in *Morin* stated that

it is doubtful that this Court should attempt to lay down guidelines in respect of a decision whether or not a sentencing circle should be used in a given case. We might comment on some of the principles at work in making such a decision, principles by which we are all bound, but we should be reluctant to lay down guidelines.<sup>65</sup>

The procedure for sentencing circles has been developing on a community by community basis through discussions among representatives from the communities, the judiciary, the Department of Justice and enforcement officials. Accordingly, there are variations in who asks for a sentencing circle, who selects the participants, where it will be held, the physical setting, and the roles of the participants.

#### **3.6.2 The Issue of Community**

The 'community of the offender' is a key element of the sentencing circle. This gives rise to the issues of defining what a community is, determining whether a willing community exists and whether it is ready to hold a sentencing circle.



### 3.6.2(a) Defining 'Community'

In *R. v. Cheekinew*, Grotsky J. stated that the term 'community' should receive "a wide and liberal construction" because it

may be, and probably is, a term capable of different interpretations depending on the residence, or proposed residence, of the particular offender and/or any other factor relevant to that term's interpretation.<sup>66</sup>

If a strict definition of 'community' is required, it should be defined by Aboriginal peoples. The Law Reform Commission of Canada [hereinafter Law Reform Commission] stated (in the context of Aboriginal justice systems), that Aboriginal peoples themselves should determine the issue of community:

Reserves and Inuit villages are clearly identifiable as Aboriginal communities; many, if not most, Metis settlements ought also to be considered Aboriginal communities, even though there may be non-Aboriginal persons living there. But what of Aboriginal people in urban centres? Do they form a community? Is such a community cohesive enough to support control over significant aspects of the justice system? Our proposal is that Aboriginal people themselves should initially make those determinations (footnotes omitted).<sup>67</sup>

RCAP acknowledged that the definition of 'community' was broader than reserves:

There was a concern at the Round Table that too much of the Commission's attention might be concentrated on justice reforms for people living on-reserve. This concern is not surprising given that almost all the discussion of reform is grounded in the notion of community and that reserves are the most readily identifiable and, for non-Aboriginals, the most easily comprehended communities. However, many Inuit, Métis and urban and off-reserve Aboriginal people spoke eloquently about their conception of community and contended that reform to the current justice system, or the creation of separate Aboriginal justice systems, were consistent with those conceptions.<sup>68</sup>

'Community' can mean a group of Aboriginal people "having a sense of solidarity, a common identity and tradition, forms of organization and a determination to preserve itself as a distinct entity" and can encompass both local and regional groupings.<sup>69</sup> It can also be

a single group of Aboriginal people living at a specific settlement or a collection of many groups of Aboriginal people spread over a large region having a common language, culture and political governing structure.<sup>70</sup>

The *Correctional and Conditional Release Act* defines Aboriginal community as: "a first nation, tribal council, band, community, organization or other group with a pre-dominantly aboriginal leadership."<sup>71</sup>

The definition of community will affect who will participate in a sentencing circle. It is important for the various interests in the community to be represented at circles.<sup>72</sup> 'Community' must include all members of the community, not just the usual spokespersons or political representatives of the community. Internal band politics or family influence should not affect the selection of circle participants, or determine whether a circle will be held. It would not be appropriate to exclude Elders, family, women, support groups, or counsellors. In cases of sexual and physical abuse, a circle should include women and the victims. The northern Saskatchewan judges, in their guidelines for sentencing circles, recognized that the band council or chief should not be asked to set up the sentencing circle and choose the participants.<sup>73</sup>

### 3.6.2(b) Existence of a Willing Community

There are differences in communities and in the role that the community plays in an individual's life. A community's willingness to participate in a sentencing circle may depend upon many factors such as who the offender is and whether the community has the resources to assist in rehabilitation. In *Cheekinew*, Grotsky J. stated that:

the nature of an offender's community, and its willingness to participate in the sentencing process, are factors which, in my respectful view, will in each particular case, depending always on the offender's suitability as a candidate therefor, be relevant to the determination of whether a sentencing circle ought to be established.<sup>74</sup>

Chief Justice Bayda, in his dissenting judgment in *Morin*, dealt in detail with the requirement that there be a willing offender and a willing community:

It is clear from the literature on the subject and from the agreement in argument of counsel before us that two mandatory criteria must be present: the willingness of the offender and the existence and willingness of a community.

The two criteria when fleshed out produce two prerequisites which may be stated as follows: Before directing that a sentencing circle be held the judge, upon considering all the evidence before him or her bearing upon that specific issue, must be satisfied that:

(1) There exists a community with the following attributes:

(i) the community is reasonably well defined by reason of the racial origin of its members, their religion or their culture or by geography or some other feature which distinguishes the community from other communities;

(ii) the community recognizes the accused not only as a member but as one who has the kind of relationship with the community that ought to make him or her feel accountable to it for any criminal wrongdoing;

(iii) the community supports the accused in his or her difficulty with the law and is prepared to accept the accused as a person who has the capacity, inclination, need and the sincerity to be restored (healed) in his or her relationship with the community and in his or

her relationship with the victims of the wrongdoing;

(iv) the community has sufficient healing or restorative resources to help the accused (and where necessary the other persons affected by the wrongdoing) in that restoration or healing.

(2) The accused:

(i) considers himself or herself a member of the community and as one who has the kind of relationship with it that makes him or her feel accountable to it for the wrongdoing;

(ii) has the capacity, inclination need and sincerity to be restored (healed) in his or her relationship with the community and with the victims of the wrongdoing;

(iii) has taken full responsibility for the wrongdoing;

(iv) has pleaded guilty or in some other acceptable way has demonstrated the attributes described in (ii) and (iii);

(v) is prepared to accept and to carry out the decision of the community acting through its representatives at the sentencing circle respecting the measures the community deems appropriate for the restoration or healing.

In the absence of any one of these prerequisites the judge should not direct the holding of a sentencing circle. On the other hand the presence of those two prerequisites does not automatically mean the judge must direct that a sentencing circle be held. After finding the presence of the two prerequisites the judge must, in addition, consider all of the other factors that bear upon the issue. I am reluctant to attempt either an all-inclusive or partial list of the factors. Such matters are better left to legislators and the interested parties to work out and settle. At the very least, they should be left open to the judges to settle on a case by case basis as they hear cases where the issues are specifically raised, are found to be relevant and are thoroughly argued.

In the end the factors that a judge ought to consider at this stage of the proceedings are those that will enable him or her to answer this critical question: Is a fit sentence for *this* accused who has committed *this* offence better arrived at by using the restorative approach or the ordinary approach?<sup>75</sup>

Chief Justice Bayda sees these criteria of community as 'prerequisites' to holding a sentencing circle. However, this would preclude the type of sentencing circle which was held in *R. v. Campbell*,<sup>76</sup> a case in which the offender had spent most of his adult life in prison and therefore had no community. In that case the

offender created a community for himself from various people (some of whom he did not know) who were willing to work with him and the court in the sentencing circle. He had a willing community, but was lacking any connection to it other than the one established through the circle. The establishment of a community for an offender could be very important to the success of a rehabilitation plan.

The example of *Campbell* suggests that an offender's connection to a community should not necessarily be a determining factor. Offenders may benefit from a circle even if they do not follow the culture or traditions of an Aboriginal community or are not part of a community. This reasoning would apply to a non-Aboriginal offender who does not have the same type of connection or even any connection to a community but who might be assisted in rehabilitation by a community supporting him or her. It is usually very beneficial to have a community to assist the offender in the rehabilitation and healing processes. However, the offender who is least 'traditional' or without a community may be the one to benefit the most from a sentencing circle. The benefit may be in terms of sentencing options and rehabilitation. The circle may also provide an opportunity for the offender to reconnect with a community, with culture and spirituality.<sup>77</sup>

The willingness of a community to be involved with a particular offender and in a sentencing circle was one of the issues on appeal in *Taylor*. The trial judge ordered a sentencing circle without referring the case to the local justice committee and without ensuring that the community and victim were willing to participate. In the majority judgment, Chief Justice Bayda found that the trial judge had

committed an error in failing to refer the offender's request to the justice committee to determine from the committee if the community was willing and able to participate in a sentencing circle for this offender. He stated: "It is undisputed that without a community willing to help to restore and re-integrate the offender into the community the restorative approach is doomed to fail."<sup>78</sup>

He found that the community as represented at the circle was initially divided about whether it had the resources to deal with this offender. However, once banishment was recommended as part of the sentence, the community became united and willing and capable of "assuming the obligation of helping to restore the offender to his place in the community as a law abiding citizen."<sup>79</sup> Chief Justice Bayda ultimately held that the trial judge's error was not fatal to the circle:

Had the community through the circle members not responded as it did I would have been inclined to find the circle proceedings invalid. That ultimate response on the part of the community...overrides and cures the judge's error in failing to consult with the community through the Justice Committee before proceeding with the sentencing circle.<sup>80</sup>

This case confirms that the existence of a willing and capable community is a requirement of a sentencing circle. Perhaps just as importantly, it holds that through the circle process itself, it is possible to overcome an error made in establishing a circle. In *Taylor*, the community, through the circle process became united and willing and capable of helping the offender, thus curing the initial defect (the same process can happen when the victim is initially unwilling as will be discussed below). This gives a great deal of importance to the sentencing circle process and the community. The community itself can terminate the application for

a circle by its unwillingness or inability to be involved. Through the circle process, the community can become empowered to assist the offender. In *Taylor*, it was the suggestion of one of the participants that banishment be part of the sentence which gave the community the tool it needed to deal with the offender and which united the community behind the offender.

### **3.6.2(c) Community Readiness**

Another important issue is whether the community is ready to participate in a sentencing circle. Problems can develop in a circle if there is insufficient planning and communication with the community to prepare for the circle, or if the community is not ready to participate or to make the commitment necessary to the offender and the victim.<sup>81</sup> The community must be ready to forgive the offender and want to reintegrate the offender back into the community. It must be ready to assist in a rehabilitation plan and to take responsibility for the offender.<sup>82</sup>

Initiatives such as sentencing circles can set up communities for failure if existing resources cannot meet the needs of both offenders and victims. The community must have adequate resources and funding to carry out the terms of the probation order and the rehabilitation plan of the offender.<sup>83</sup> This was noted in the dissenting judgment of Chief Justice Bayda in *Morin*.<sup>84</sup> RCAP also recognized the importance of the planning of community justice projects and recommended that funding be provided for a development phase for any new justice project (for a period of one year to eighteen months).<sup>85</sup>

Another factor in assessing a community's readiness to participate in sentencing circles may be whether circles have a cultural basis or connection to the community. Pauktuutit, an Inuit women's group, is concerned that governments and the judiciary are implementing justice initiatives such as sentencing circles (which do not have a connection to Inuit culture) into communities and in doing so are focusing on the needs of offenders, not on victims and particularly, women.<sup>86</sup>

The initiative to transfer responsibility should come from the community, not from governments or judges.<sup>87</sup> The community's and victims' needs must not be compromised by the needs of the offender or the need to make changes in the justice system.<sup>88</sup> Community-based services must have clear guidelines and standards which reflect the interests and needs of all members of the community, especially the victims.<sup>89</sup> Because women are often victims, they must be involved in the design and delivery of offender programs.<sup>90</sup> RCAP stated:

A genuine consultation process is one that allows all those affected by the development of the justice project to have meaningful input to the process. A process undertaken only as a formality and that ignores sectors of the community that want input is obviously not a true consultative process.<sup>91</sup>

However, even if guidelines do protect members of the community, especially victims, it must not be assumed that all people, especially women, have access to information and have real opportunities to speak out.<sup>92</sup>

Community readiness, goals and resources should determine the nature of sentencing initiatives. A sentencing circle will not always be the most suitable alternative for the community. Ross pointed out that:

there may be as many methods of involving Native communities in



sentencing--and in carrying out the particulars of any sentence imposed--as there are Native communities. I doubt that any blanket strategy will be either appropriate or productive, for individual communities have wildly varying capacities, power structures, aspirations and emphases...many of these communities possess unique capacities for effecting both deterrence and rehabilitation, our central and common goals.<sup>93</sup>

### **3.6.3 Aboriginal Ethics and Elders**

Counselling from Elders is a vital part of the healing process in many Aboriginal traditions. Elders usually participate in sentencing circles because communities consider their wisdom, knowledge and guidance important. One of the criteria the northern Saskatchewan judges consider before holding a sentencing circle is whether Elders or respected non-political community leaders are willing to participate.<sup>94</sup>

However, the traditional role of Elders is that of healers and teachers. This raises the issue of whether Elders can or should participate in sentencing circles (because they deal, in part, with punishment). Aboriginal ethics of non-interference and of not criticizing others may limit the ability of some Elders and other community members to participate in a discussion about past actions, mistakes and wrongful conduct of another.<sup>95</sup> These issues will have to be part of assessing the suitability of a sentencing circle in a particular case and for a particular community and should be addressed by the Elders and communities.

Elders and other community members who attend sentencing circles and sit on local justice committees are usually volunteers. If their work in the circle and their commitment to the offender, the victim and the community are not respected,

if their recommendations are not followed, or if sentences are appealed, their confidence in the circle process and the justice system can be destroyed. Many may not be willing to participate in a second circle if their first efforts are overturned by the sentencing judge or appeal court. Volunteers must be supported by their communities and must not be over-worked. Their services are important to the success of justice initiatives. Compensation should be paid to community members who administer community justice committees or arrange sentencing circles. If volunteers or community workers are over-worked, they may 'burn-out' and the community may not have the support required for circles and other justice initiatives. These are issues that should be addressed when considering community justice initiatives.<sup>96</sup>

#### **3.6.4 The Role of the Victim**

It is important to have the victim as part of a sentencing circle. Victims cannot be legally compelled to attend or speak. However, if pressure is placed upon them by the court, the offender or the community, they may feel that they have no choice but to attend.<sup>97</sup> Two of the criteria which the northern Saskatchewan judges consider before ordering a sentencing circle are whether the victim is a willing participant (or has been subjected to coercion or pressure), and whether the victim is affected by battered spouse syndrome (if so, counselling should be available and a support team should accompany her at the circle).<sup>98</sup> Victims do not have to speak or make a recommendation on sentence if they choose not to do so.<sup>99</sup> One judge who held a 'circle' without the victim's

participation (*Campbell*) indicated that because the victim was absent, that it was really not a sentencing circle. However, there seemed to be no difference between it and a circle where the victim was present. In that case the focus of the circle was on a suitable punishment and rehabilitation plan for the offender and the absence of the victim did not affect the circle process.<sup>100</sup>

The Saskatchewan Court of Appeal dealt directly with the issue of the consent of the victim in *Taylor*. The victim was not consulted by the trial judge before he ordered a sentencing circle to be held. She was told that a circle would be held after the decision had made. She did not wish to participate, but felt that she had to go to the circle and had to participate.<sup>101</sup> Chief Justice Bayda, speaking for the majority, found that the failure to confirm that the victim was willing to participate in the circle before deciding to hold it was an error:

Consultation with the victim is particularly important in a sexual assault situation. But again the question is whether the error is of a substantive nature or one of irregularity that is curable.<sup>102</sup>

Chief Justice Bayda found that through the circle process, the victim became a “willing participant” and

She was particularly anxious to have Mr. Taylor healed and restored so that he could be “a father” to her daughter...she was part of the consensus that made the recommendation to the judge.<sup>103</sup>

He held that this cured the trial judge’s error in ordering the circle without consulting her.

Chief Justice Bayda went on to state that in special circumstances a victim could be represented at a sentencing circle by a surrogate (particularly in sexual assault situations):

the presence of the victim is usually essential to the success of a sentencing circle, but there will be cases where a circle can be successfully held with a surrogate taking the victim's place.<sup>104</sup>

It would appear from this reasoning that the presence of the victim or a "surrogate" is an essential requirement to hold a circle.

Compare this approach to Chief Justice Bayda's dissenting judgment *Morin*. He stated that the presence of the victim is one of the factors the judge may consider when deciding whether to hold a circle, but that in some cases, it may not be essential for the victim to be present for the restorative approach to sentencing to be effective.<sup>105</sup> His approach in *Morin* would seem to be better than a hard rule that the victim must be present. It allows more flexibility for the offender and the community. It may also relieve the victim from pressure to attend. If the presence of the victim is a prerequisite to a circle, an offender who may be sincere in pursuing rehabilitation may be denied the benefits of the circle if the victim is not willing or able to attend.

Quaere whether the door is still open for a circle without the victim. In certain circumstances it may not be important to the restorative approach that the victim be present (e.g. in property damage, public mischief, offences without a particular victim such as possession of narcotics, or other cases where restitution and acknowledgement of responsibility may be sufficient to allow the circle to deal with the issues of the offender). The approach of Chief Justice Bayda in *Morin* seems to be better. If the victim has objections to the circle proceeding, the judge should take this factor into account in deciding if it is a suitable case for a sentencing circle. It should be within the discretion of the judge to order that a

sentencing circle be held without the victim (in line with the broader discretion given to sentencing judges in the recent Supreme Court of Canada cases to be discussed below).

### 3.6.5 Appealing Sentencing Circles

Aboriginal communities question why the Saskatchewan Department of Justice is appealing sentencing circle decisions. It would seem to be an interference with the development of Aboriginal justice initiatives. It can also be interpreted as a lack of confidence in the community and the sentencing circle process, as well as a lack of good faith towards the circle participants who have volunteered their time. Chief Blaine Favel (in his capacity as Chief of Poundmaker Cree Nation) stated:

In order to begin to take responsibility for our own justice, beginning with trial and conviction, we need the co-operation of many people. We need the co-operation of Crown prosecutors and the co-operation of many good judges. Today we do have people in the Canadian criminal justice system who recognize that there needs to be change, and there are programs that try to meet community needs. Unfortunately, what happens after the community attempts to deal with problems in a unique way is that the Crown immediately appeals the verdict. The Crown appeals because it says the decision violates *stare decisis* and that it sets an unacceptable precedent...What does this do to the community, which has tried to be innovative in dealing with its problems? It puts the community back a step, because after its demonstration of courage and its sincere effort to control dispute resolution, the community is pushed back and told that its people do not have a legitimate say over what happens in their territory.<sup>106</sup>

If the prosecutor cites the 'public interest' as the reason to appeal a sentencing circle decision, who is the public he is representing? Stuart J. in *Moses*

stated:

The Crown and judge who do not live in the community and are not familiar with the community must be cautious in opposing, on the basis of a need to "protect the public", a rehabilitative plan developed by the community.<sup>107</sup>

The public most affected by the offender's conduct is usually the community represented at the circle.<sup>108</sup> Yet, by appealing the sentencing circle's decision, the Crown suggests that the victim and the community are not imposing an appropriate sentence or don't know what is best or most effective in their own community.<sup>109</sup>

The decision of the Saskatchewan Court of Appeal in *Taylor* would appear to give much more scope to the interests of the community and to the discretion of the judge in a sentencing circle. Chief Justice Bayda found that the circle participants could be assumed to know the needs and conditions of their community and that such knowledge "put them in the peculiar position of being able to fashion the "just and appropriate mix of accepted sentencing goals."<sup>110</sup> By adopting a 'deferential' standard of appellate review, the Supreme Court of Canada and the Saskatchewan Court of Appeal should have made it more difficult for the Crown to appeal these decisions, but it will remain to be seen in future cases.<sup>111</sup>

The role of politics and policy in appealing sentencing circle decisions must be recognized. If government policy is directed towards self-government, then risks, innovation and a trial and error approach must be taken. It is not possible to change the sentencing process while appealing decisions of sentencing circles in

order to conform to existing sentencing guidelines.

### 3.6.6 When Should A Circle Be Held?

It is clear that the issue of a circle arises only when there has been a determination of guilt through plea or trial.<sup>112</sup> The Saskatchewan Court of Appeal in *Taylor* dealt with the issue of whether a guilty plea is a prerequisite to being eligible for a circle. The trial judge had held that whether or not the offender pleads guilty is irrelevant to the issue of the sentencing circle. Chief Justice Bayda did not agree:

A guilty plea is usually a good measure of an accused's accepting responsibility for his wrongdoing and his sincerity to be restored in his relationship with the community and the victims of the wrongdoing. A "not guilty" plea does not necessarily preclude the holding of a sentencing circle but it does require the offender to demonstrate his remorse, sincerity and acceptance of responsibility in some other way. Failing such a demonstration the judge would be justified in refusing the request for a sentencing circle.<sup>113</sup>

Chief Justice Bayda goes on to state that if the trial judge had referred the request for the circle to the local Justice Committee of the community (in accordance with the procedure developed in Saskatchewan Provincial Court), the Committee would have looked into the suitability of the offender for a sentencing circle. This process would have involved

assessing his remorse, sincerity and acceptance of responsibility. The judge would have had the Committee's assessment before making his decision about the appropriateness of a sentencing circle.<sup>114</sup>

Chief Justice Bayda further found that in failing to make the reference, and in

giving only summary consideration to this criterion, an error was committed by the trial judge. The Court of Appeal had to determine if this amounted to “a non-curable substantive error on the judge’s part...or an irregularity that did not vitiate the proceedings.”<sup>115</sup> He determined that if the participants of the circle had not given

the matter of Mr. Taylor’s remorse, sincerity and acceptance of responsibility serious consideration and determined that indeed he was remorseful, sincere and accepting, I would have had no difficulty in finding the circle proceedings fatally flawed.<sup>116</sup>

Because the circle participants had accepted the offender as a person for whom the restorative approach could be beneficial, Chief Justice Bayda found that this cured the trial judge’s error “in his approach to making a proper assessment of Mr. Taylor’s remorse, sincerity and acceptance of responsibility before deciding to proceed with a circle.”<sup>117</sup>

Every offender will not qualify for a sentencing circle. The Saskatchewan Court of Appeal severely restricted the use of sentencing circles with the decision in *Morin* which limited their use to cases in which the offender is facing less than two years imprisonment.<sup>118</sup> Chief Justice Bayda, in his dissenting judgment in *Morin* disagreed:

In the case of an offence for which there is no prescribed minimum sentence a sentencing circle is, technically speaking, possible in every case. Whether it would be appropriate to hold one is, of course, another matter. It would be wrong in my respectful view to impose a hard and fast rule to the effect that a sentencing circle is not available where the ordinary approach would likely produce a sentence of incarceration of say two years or more. That appears to be what the learned trial judge did in *R. v. Cheekineew* (supra). In my respectful view he erred.<sup>119</sup>



It seems to be prejudging the outcome of a sentencing circle to limit it to cases likely to result in a sentence of less than two years. Even if probation cannot be ordered because a term of incarceration is over two years, a sentencing circle might be beneficial to an offender if it mobilizes the community to help with rehabilitation.<sup>120</sup> There may be cases in which an offender (who might normally expect a long term of incarceration) will be found to be a suitable candidate for a shorter sentence with probation after discussions at a circle and an assessment of the possibilities for rehabilitation.

In the Saskatchewan Court of Appeal decision in *Taylor*, Chief Justice Bayda finessed the majority decision in *Morin* and stated:

I do not read the majority judgment of the Court in *R. v. Morin*...in a way that would foreclose the discretion of a trial judge to direct that a sentencing circle be held given the circumstances of the present case and particularly when read in the light of the legal principles for sentencing judges and the principles for reviewing appellate judges recently enunciated by the Supreme Court of Canada...in *R. v. McDonnell*...*R. v. Shropshire* ...and *R.v. M.(C.A.)*.<sup>121</sup>

He went on to state that most of the participants of the circle did not advocate further incarceration for the offender who had already spent time on remand. Accordingly, the judge was justified in refusing to reject the case as inappropriate for a sentencing circle. It could not be said that a penitentiary term, in these circumstances, was mandatory "regardless of the other objectives and principles of sentencing."<sup>122</sup> Chief Justice Bayda goes on in his reasons for judgment to discuss the seventh criterion in *Joseyounen* and to show how the trial judge himself "stretched" the criterion in another sentencing circle case. That case itself

showed

the impropriety of a rigid application of the seventh criterion and the caution with which one ought to apply that criterion.<sup>123</sup>

This is the same approach Chief Justice Bayda took in his dissenting judgment in *Morin* where he rejected the 'two year' rule in *Cheekinew*:

In my respectful view he erred. The nature and seriousness of the offence for which the accused is convicted is clearly a factor that the judge will need to take into account at this stage but it is only one factor, sometime a determinative factor, but not necessarily a determinative factor (unless there is a prescribed minimum sentence). A hard and fast rule is tantamount to starting the process of a restorative sentence at the wrong end. It is tantamount to equating the carceral component of a fit ordinary sentence with the carceral component of a fit restorative sentence. Such a rule in my respectful view would have a serious emasculating effect on the underlying need for sentencing circles and would amount to offering the benefit of a sentencing circle to only those offenders who need it least. In cases involving First Nation offenders there would be justification for the contention that the courts were only paying lip service to the principle of sentencing circles rather than searching for "drastic steps".<sup>124</sup>

In the case of *Moses*, Stuart J. acknowledged that a sentencing circle "may not be appropriate for all crimes or all offenders."<sup>125</sup> In *Taylor*, Chief Justice Bayda stated "The fact that the offence is a serious sexual assault does not automatically rule out a sentencing circle."<sup>126</sup> He reasoned that the classification of a serious sexual assault as inappropriate for a sentencing circle would have to come from the starting point sentence being greater than 2 years imprisonment. He held that the Supreme Court decision in *McDonnell* (which held that deviation from a starting point sentence did not of itself constitute an error giving rise to review by an appeal court) overruled that reasoning.<sup>127</sup>

In Saskatchewan an offender usually gets only one 'break', only one

sentencing circle.<sup>128</sup> Unfortunately, this approach misses the fact, as stated by Stuart J. in *Moses*, that:

Rehabilitation from extensive substance abuse and tragic personal problems will take time, patience and perseverance. Each set-back must not be the end of trying. Each failure must not be seen as justification for punishment. As long as there is a genuine on-going struggle by Philip against his life long demons, encouragement and help must be offered.<sup>129</sup>

In *Cheekinew*, Grotsky J. indicated that the offender must display a certain attitude to be considered for a circle and must be genuinely contrite and be honestly interested in working with the community to change his or her life.<sup>130</sup> However, this may prove to be a discriminatory requirement because Aboriginal codes of behaviour may mean that a show of remorse is not culturally appropriate. Because the judge has the discretion to order a sentencing circle, the decision of whether one is held is made by the justice system, not the community. The standards for assessing readiness of an offender may be made on the basis of Euro-Canadian values of readiness, or contriteness or honest efforts and not by the community's standards and values. It is therefore important, as stated in *Taylor*, that judges work with local justice committees when deciding whether a circle should be held.<sup>131</sup> It should also be recognized that the circle process itself may assist the offender in realizing the consequences of his or her actions and cause remorse and an acceptance of responsibility for the offensive conduct.

### **3.6.7 Authority of the Judge Over the Circle Participants**

The court does not have authority over members of the circle except the

offender and counsel, and therefore, the judge has to carefully word the sentence. The accused should not be placed in a position of breaching an order because another person failed to do something, or because a treatment plan fell through.<sup>132</sup> The judge also has to ensure that if there is going to be community supervision or direction of the offender, that such actions of the community be lawful, reasonable, and productive. Offenders should be advised that if there is a problem with the community supervision of the sentence, or if it becomes impossible to perform, that they can come before the court for a review and possible amendment of the order to avoid a charge of breach of probation.<sup>133</sup>

#### **3.6.8 Is a Consensus Necessary?**

At the end of the sentencing circle discussions, the judge usually discusses whether a consensus was reached and articulates what it is.<sup>134</sup> In some cases it is relatively easy for the judge to sum up the discussions, and to clarify and confirm the consensus with the participants. However, a sentencing circle will not always reach a consensus (in terms of total agreement of all participants). In the case of *Morin*, the Crown was not in agreement with any recommendation of the circle. The best that could be achieved was a consensus of the remaining participants. The judge had to struggle with a clearly adversarial proceeding and had to strongly advise the participants that a consensus was advisable because the Crown was going to appeal whatever sentence was handed down.<sup>135</sup> The trial judge seemed to think that a consensus of the remaining participants would be an important

factor in the appeal. The larger issue is whether it really matters if there is a consensus if the judge is not going to follow the circle's recommendations or is not bound by them.

The majority judgment of the Court of Appeal in *Morin* did not deal with the issue of consensus. However, Chief Justice Bayda, in his dissenting judgment indicated that consensus means total agreement. However, he did not want a lack of consensus to nullify a sentencing circle:

The matter of whether a sentencing circle should be required to arrive at a consensus before giving its recommendation is not an easy one. Generally speaking a consensus is highly desirable. The need for a consensus is, of course, in the tradition of a healing circle, the progenitor of the sentencing circle. But a rule that renders a sentencing circle result nugatory in the absence of a consensus is much too harsh. A recalcitrant or intransigent participant who, it turns out, may have motives inconsistent with the success or effectiveness of a sentencing circle should not be the holder of what amounts to a veto of the proceedings. The better answer is that the judge will need to assess each such situation of non-consensus and determine what weight, if any, should be put on the inability or failure of one or two or more members to participate in the consensus of the remaining members.<sup>136</sup>

### 3.6.9 Public Protection

The majority decision in the Saskatchewan Court of Appeal in *Morin* affirms the principles of sentencing enumerated in *Morrisette* (including the protection of the public).<sup>137</sup> The judgment quotes with approval from *Joseyounen*:

The aim of sentencing circles is the same as it is when the disposition is arrived at by other means: the protection of society by curtailing the commission of the crime by this offender and others.

However, in sentencing circles the emphasis is less on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community.<sup>138</sup>

In the particulars of the *Morin* case, the majority judgment of the Court of Appeal stated that the offender had repeatedly failed to benefit from alcohol treatment and that therefore

it cannot be said that the prospects of rehabilitation through a probation order compelling abstention from consumption of alcohol or compelling treatment for alcohol abuse is so good that it should take precedence over protection of the public.<sup>139</sup>

In his dissenting judgment, Chief Justice Bayda stated that the justice system could accommodate sentencing circles while respecting the principle of the protection of the public:

our present justice system is flexible, accommodating and geared to do what must be done to achieve fairness and justice for all. That quality enables the system to embrace sentencing circles as part of the system and to ascribe to them a role in addressing the disparity in the prison population by empowering communities to help individuals break their personal cycles of misbehaviour. That accommodation not only respects the overarching principle of protection of the public into which all of the other sentencing principles are subsumed but enhances it. In that sense, the perpetuation of entrenched attitudes in relation to sentencing in the guise of maintaining sentence parity is not in the interests of the administration of justice in this province or the well-being of our society.<sup>140</sup>

The protection of the public is both the purpose of the justice system and a principle of sentencing. If the sentencing circle can provide the process by which an offender can rehabilitate and reintegrate into the community, this would seem to accomplish the goal of the protection of the public.

### **3.6.10 Should Circles Be Limited to Aboriginal Offenders?**

The issue of whether sentencing circles should be limited to use by

Aboriginal offenders has arisen in academic debate.<sup>141</sup> The first sentencing circle held for a non-Aboriginal offender and community in Saskatchewan was held in Katepwa Beach in September 1996.<sup>142</sup> Although some people might think that it is important to limit circles to Aboriginal peoples because of the cultural and traditional significance of the circle and circle discussions, there is no legal reason to do so if an offender can meet the criteria of the sentencing judge (particularly if there is a community context conducive to a sentencing circle).<sup>143</sup> The circle held at Katepwa Beach involved a small community which had the same ability to watch over and police the offender as may exist in an Aboriginal community. It must also be remembered that the sentencing circle is being used in Aboriginal communities which have no connection to the healing circle (e.g. Inuit communities). Therefore, it would seem that they should be regarded as a valid sentencing tool in any community. If the circle process provides a greater opportunity for community healing and rehabilitation of the offender, it should be used by non-Aboriginal offenders.

### **3.6.11 Sentence Disparity**

Public perception of sentence disparity is a crucial issue in the use of circles in Saskatchewan and throughout Canada.<sup>144</sup> The public perceives that circles result in 'lighter' sentences. There may, of course, be offenders within Aboriginal communities who will request a circle, hoping for a 'lighter' sentence. However, the same commitment to rehabilitation is not demanded of a person sentenced in the

usual manner as is expected in a sentencing circle. Experience may show that it would be easier to have an ordinary sentence imposed and served, than it would be to go through the healing process, community rebuilding and rehabilitation required of a circle's sentence.<sup>145</sup>

The public perceives that sentencing circles are unfair to non-Aboriginal offenders. The public generally believes that all people should be equal before the law. However, this perception does not take into account the inequality of Aboriginal peoples within Canadian society. Equality before the law must encompass more than like sentences for like offenders or like offences. Stuart J. in *Moses* dealt with sentence disparity and stated that there should be more variations in sentences:

In a multi-cultural society, where gross inequities in opportunities, social resources, and social conditions abound, just sentencing cannot be measured against any standard, national, "typical sentence". If the predominant objectives in sentencing are protection of the community, rehabilitation of the offender, minimizing adverse impacts on victims, and greater community involvement, then even greater differences in sentencing for the same offence should be expected and welcomed.<sup>146</sup>

The equitable treatment of Aboriginal peoples in Canada demands that when our justice system cannot meet Aboriginal cultural needs, then the justice system must accommodate special practices. In order to provide the same level of services and the same degree of justice to Aboriginal peoples, cultural realities (i.e. the differences between being Aboriginal and non-Aboriginal) must be acknowledged and accommodated.<sup>147</sup> As stated by Worme: "There is nothing so unequal as the equal treatment of unequals."<sup>148</sup> The participants in the Canadian



justice system and the general public must understand the effect of 'difference' upon offenders:

Attention should be drawn to the hollowness of the view that ensuring formal legal equality is sufficient. Identical treatment of people in the criminal justice process may well mean unequal treatment, if the law fails to recognize initial difference between people. There are fundamental distinctions among Canadians which can and for some purposes *should* be recognized, based on cultural, historical, social, economic and political factors. These variables have given rise to vast inequalities in Canadian society which do not stop visiting their effects upon individuals and groups at the doors of either the police station, the court room or the prison. The disadvantages imposed by inequality are pervasive and they are also permanent, unless meaningful remedial measures are taken.<sup>149</sup>

It is a myth that there is 'one law for all' in Canada as is so often argued by critics of sentencing circles and Aboriginal justice initiatives:

While the popular conception of Canadian law is that there is one centrally organized legal system in Canada, on any empirical base this ideology is shown to be suspect. There are a multiplicity of competing legal orders - often conflicting, always interpenetrating - in modern Canada. What is lacking is only the recognition by the "official" institutions of the legal system put into place by the political state that these other systems exist...Recognizing and legitimating the plurality of legal orders operating alongside the "official" justice system in Canada is the best means for overcoming these differentiations of access and outcome. The benefits of this recognition apply to both the civil law and the criminal law...the attempt within Aboriginal communities to develop specific standards through procedures such as sentencing circles is, once again, simply the application of this insight.<sup>150</sup>

Academic support for initiatives such as sentencing circles is strong. The real question is whether the political will exists to proceed, and whether there will be acceptance by the public and the judiciary that sentence disparity may not be disparity in the context of Aboriginal offenders and the sentencing circle process. In *Morin*, the Saskatchewan Court of Appeal majority decision adheres to the old

sentencing principles and the concept of avoiding or rationalizing disparity in sentences.<sup>151</sup> The majority concludes that since the Court of Appeal and the sentencing judge are bound by the principles of sentencing, the recommendations of a sentencing circle can be used by a judge only in those cases in which "a court is justified in taking a calculated risk and departing from the usual range of sentencing."<sup>152</sup>

In Chief Justice Bayda's dissenting judgment in *Morin* the approach to disparity is different. He begins with the disparity in the number of Aboriginal offenders imprisoned in Saskatchewan compared to non-Aboriginal offenders:

Given that unhealthy scenario, the argument that the need to eliminate the disparity in sentencing as it is understood in the traditional sense must defer to the need to eliminate the disparity reflected in the composition of the prison population is compelling indeed...But the deference does mean to recognize that our present justice system is flexible, accommodating and geared to do what must be done to achieve fairness and justice for all. That quality enables the system to embrace sentencing circles as part of the system and to ascribe to them a role in addressing the disparity in the prison population by empowering communities to help individuals break their personal cycles of misbehaviour. That accommodation not only respects the overarching principle of protection of the public into which all of the other sentencing principles are subsumed but enhances it. In that sense, the perpetuation of entrenched attitudes in relation to sentencing in the guise of maintaining sentence parity is not in the interests of the administration of justice in this province or the well-being of our society.<sup>153</sup>

Again, the true issue is the effect and the effectiveness of the sentence. A term of incarceration can be seen as equivalent or not disparate from a sentence suggested by a circle (particularly when the probation conditions and effect of community justice on the offender is examined). The recent decisions of the Supreme Court of Canada also give more flexibility in sentencing and less

emphasis on parity and starting point sentences.

### 3.6.12 Protection of Individual Rights

By its very nature, the sentencing circle focuses on community welfare and the individual offender's rehabilitation, not on the protection of individual rights. In contrast, the Euro-Canadian justice system and the *Canadian Charter of Rights and Freedoms*<sup>154</sup> provide for the protection of individual rights against others and against the state (even in cases where it is against the best interests of the community or state to do so). However, the issue of the application of the *Charter* to sentencing circles does not seem to be important. When offenders have consented to or requested a circle, they are impliedly consenting to the procedure of the circle (including the open discussions and questions which would normally be in violation of an offender's *Charter* rights).<sup>155</sup>

The Law Reform Commission, in discussing Aboriginal justice systems, has suggested that:

it is theoretically possible for each member of the community to waive *Charter* rights. This approach sounds impractical, but if jurisdiction for the Aboriginal system is determined in part by the agreement of the accused, then waiver on a case-by-case basis can be obtained: opting for the Aboriginal system conceivably could be a waiver of *Charter* rights. What is unclear, and may require guidance from the courts, is whether it is possible for a person to make a blanket waiver of all individual rights under the *Charter*.<sup>156</sup>

Sentencing circles have the usual protections of the criminal justice system: they are held in open court; transcripts are usually available, the offender is given the opportunity to speak; Crown and defence counsel retain their traditional roles;

and disputed facts can be proven in the usual manner (i.e. evidence and cross-examination under oath).<sup>157</sup> The issue of violation of individual rights is not likely to be raised because the offender is usually anxious to rehabilitate and restore community harmony. It is not likely that a procedure requested or consented to by the offender is going to give rise to a later complaint.<sup>158</sup>

### **3.6.13 Time Constraints**

The time involved in the preparation for a circle and in the circle discussions can be viewed as a major problem.<sup>159</sup> The usual sentencing hearing takes a very short time. The sentencing circle represents an enormous commitment of time and court resources. If sentencing circles are used more frequently, the government must be willing to reallocate funds to additional court and judicial time. However, it is not realistic to expect that sentencing circles could become the norm in Saskatchewan. Even if reducing the incarceration of offenders would save money (which could be allocated to pay for the extra court time spent in sentencing hearings), it would be impossible for every suitable offender to be dealt with by a circle without a major redirection of the resources and time of the justice system.

## **3.7 CONCLUSION**

The sentencing circle has raised many issues in Saskatchewan, not only those specifically related to the circle, but also broader justice issues. The issue of what a sentencing circle might actually accomplish can be examined in the

context of Ross's article "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing". Ross discusses and compares the approaches of the Hollow Water project and the Sandy Lake Elders' panel project. The first is a community-based healing project while the latter is a sentencing advisory project involving community Elders. Ross deals with the issue of where justice initiatives should start: should they be focussed on improving the existing justice system or should they instead get to the root of the community's underlying problems (in the case of Hollow Water the project is dealing with sexual abuse within the community). He concludes that changing the existing legal system won't give a community the help it needs to deal with its problems.<sup>160</sup> Ross also alludes to the similarity of the community approach in Hollow Water to that of sentencing circles in the role of the community:

The same dynamic is being played out in sentencing circles as well, where people come into the circle to discuss their relationship with the accused, to learn about the sources of disharmony in all of his or her relationships, and to suggest how they might change their own behaviour in order to restore that global harmony.

Both the Hollow Water and the circle sentencing approaches appear to stand in rather stark contrast to the limited investigation undertaken within the western system, and to the limited number of people who bear the responsibility for providing the accused with future assistance.<sup>161</sup>

Are sentencing circles merely an improvement to the existing justice system or are they a means to reach the underlying community problems? It would appear that they can be both, depending upon the community's approach to them. If the community has the resources to assist in the rehabilitation of offenders and to also deal with problems within the community, the sentencing circle may provide the

impetus needed for these things to occur. However, if the community is underfunded and under-resourced or is not ready to deal with personal and community problems, the circle will merely provide a better method to sentence an offender. As will be discussed in Chapter Four, there is also the question of whether sentences circles are merely a reform of the justice system, whether they are a transitional stage in the development of Aboriginal justice systems, or whether they are both.

It is important to deal with the many issues that sentencing circles have raised. This involves an open-minded critique of existing sentencing principles and practices and an acknowledgement that there may be more than one approach to justice issues and to the sentencing of offenders.

There may be potential for change in the existing justice system. However, if a significant change of perspective and an openness to accommodation of cultural differences is not demonstrated and acted upon, it will be too late (if indeed it isn't already) for Aboriginal communities to hold out any hope of working within the existing system. Given the slowness of any significant change and the increase in Aboriginal persons being processed by the criminal justice system, it would not appear likely that the issues raised by sentencing circles are going to be dealt with in any meaningful way.

## ENDNOTES

1. *R. v. Morin*, [1994] 1 C.N.L.R. 150 (Sask. Q.B.) [hereinafter *Morin* (Q.B.)]; *R.v. Morin*, [1995] 9 W.W.R. 696 (Sask. C.A.) [hereinafter *Morin* (C.A.)]
2. Judge Claude Fafard, "On Being a Northern Judge" in Richard Gosse, James Youngblood Henderson and Roger Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) 403 at 404.
3. *R. v. Moses*, [1992] 3 C.N.L.R. 116 (Yukon Terr. Ct.).
4. Ross Gordon Green, *Aboriginal Sentencing and Mediation Initiatives: The Sentencing Circle and Other Community Participation Models in Six Aboriginal Communities* (LL.M. Thesis, University of Manitoba, 1995) [unpublished] at 91. In his Thesis, Green identified and studied three Aboriginal communities in Saskatchewan:
  - a) Sandy Bay, which has sentencing circles as well as a committee which meets outside the court and makes sentencing recommendations to the court on cases referred to it by the court;
  - b) Pelican Narrows, which held its first sentencing circle in 1994. A sentencing circle committee was formed which held sentencing circles in cases referred to it (in Cree without the judge) and then made recommendations to the judge;
  - c) Cumberland House, which has sentencing circles and a committee which acts as a sentence advisory committee and a mediation committee.
5. *Morin* (Q.B.), *supra* note 1 at 152-3. See also Department of Justice, *Sentencing Circles-A Discussion Paper* (Saskatchewan: Policy, Planning and Evaluation Branch, 1993) at 4 [hereinafter Department of Justice].
6. An issue arises whether offenders will have to 'judge shop' for a judge who is readily disposed to holding sentencing circles. Some judges may not support the concept of sentencing circles. Some may not feel comfortable with the process. Some may not have the confidence in the Aboriginal community to grant the request. Perhaps in the future, there will have to be some preliminary procedure to channel offenders to certain judges for the purpose of holding circles.
7. *R.v.Campbell*, 6 Mar. 1995 (Sask. Prov. Ct.). The offender was not represented by counsel. He contacted the circle participants himself and asked them to attend. Most of the participants had not met the offender. He did not have a community because he had spent most of his adult life in jail. He created his own community.
8. *Morin* (C.A.), *supra* note 1 at 732-3.

9. *R. v. Taylor* (18 December 1997), #6896 (Sask. C.A.).
10. *Ibid.* at 24-5.
11. *Moses*, *supra* note 3 at 122-3, 126, 131.
12. The author observed a sentencing circle held for two offenders on the Kinistin Reserve, Saskatchewan in which circle participants and observers smoked, left the circle for coffee, chatted with others and in which children were active in the band hall (*R. v. Thomas* and *R. v. Lumberjack*, 3 Dec. 1993 (Sask. Prov. Ct.) [hereinafter referred to as the Kinistin sentencing circle]).
13. Green, *supra* note 4 at 94 observed:

Although physical setting of circles will vary between judges, communities and jurisdictions, there is commonality between the circles. All involve the offender, judge, a Crown representative and a number of influential and respected local community members. Other participant are usually the victim, defence counsel and family members of the offender and victim. Of the circles observed during this study, most had between 20 and 30 participants.
14. Teresa M. James, *Circle Sentencing* (Supreme Court of the Northwest Territories, 1993) [unpublished] at 20.
15. *Ibid.* at 12. The author observed this at the *Campbell* sentencing circle, *supra* note 7. One of the Aboriginal participants raised this issue and explained its significance. The judge asked for a suitable object from the circle participants. One member gave a neck piece to be used for this purpose. It was transferred, along with the microphone (for recording purposes) to each speaker.
16. *Moses*, *supra* note 3 at 131.
17. *Ibid.* at 131.
18. *Morin* (C.A.), *supra* note 1 at 733.
19. *Criminal Code*, R.S.C. 1985, c. C-46.
20. For a critique of a sentencing circle in which translation was not provided by the court see Mary Crnkovich, *Report on the Sentencing Circle in Kangiqsujuag* (Pauktuutit and Department of Justice, Canada, 1993) [unpublished] at 7-8:

The discussions which did take place were not as "free-flowing" as one could expect. This could have been due, in part, to the language barriers existing within the group. For the unilingual Inuktitut and English speakers, the court interpreter was a member of the circle.



However, her role was taken over the Chair of the Task Force.

By not having simultaneous or concurrent interpretation, those unilingual speakers, both Inuktitut and English, were not able to participate on an equal footing. Rather than hearing the actual words of the speakers, the participants heard, in the third person, the views of the person in a summarized form. The Court Interpreter has a valuable role to play in this circle interpreting the words of the speakers. Without this unfettered type of interpretation, the impact of a lot of speakers comments, first hand is lost. The emotion and feelings behind the words of speakers are lost (endnotes omitted).

21. *Moses*, *supra* note 3 at 122.

22. For example, see Poundmaker Cree Nation, *Protocol of the Katapamiswak Society-Sentencing Circles Healing Circles* (06 Dec. 1993). Pursuant to the *Protocol*, Poundmaker Cree Nation, Saskatchewan, formed a Community Justice Committee and established a procedure for sentencing circles.

23. See Crnkovich, *supra* note 20 at 4-7 for a critique of a sentencing circle in which the judge did not clarify the purpose of the circle, and did not appear to adequately inform the participants about their respective roles and responsibilities.

24. See *Moses*, *supra* note 3 at 131-32:

By stating at the outset an upper limit to the sentence based on conventional sentencing principles and remedies, the offender enters the circle without fearing a harsher jail sentence provoked by candour or anger within the circle. This constitutes an important basis to encourage offenders to participate.

The upper limit also provides a basis for the circle to appreciate what will happen in the absence of community alternatives. The utility of the upper sentence can be measured against any new information shared in the circle. Any community based alternative developed by the circle may be substituted for part or all of this sentence.

However, the Saskatchewan Department of Justice questioned whether it raises false expectations in the offender or causes a problem on appeal, to indicate an upper limit on sentence: Department of Justice, *supra* note 5 at 10.

25. This was observed by the author at the sentencing circle held in *Morin* (Q.B.), *supra* note 1.

26. This was observed by the author at the circle of a young offender presided over by Judge Bria Huculak in Saskatoon. (Judge Huculak indicated that the proceeding was not a sentencing circle, but in form and substance it was one. The focus of the

discussions was a plan to help the young offender).

27. This was observed by the author at the Kinisten sentencing circle, *supra* note 12.

28. *Moses*, *supra* note 3 at 132.

29. Department of Justice, *supra* note 5 at 9. At 10 the issues of perjury and slander in reference to statements given during a circle are raised.

30. *Taylor*, *supra* note 9 at 5-7 and 28-31.

31. The author observed this type of circle at the Kinistin sentencing circle, *supra* note 12. The judge turned the circle over to the community and let the participants run it without his interference. With only minor modifications, he passed the sentence which the community had agreed upon, even though it was not the usual sentence for such an offence. In contrast, the author observed that in *Morin* (Q.B.) *supra* note 1, the sentencing circle was very adversarial in nature and the judge had to struggle to assist the participants in reaching a consensus.

32. This is a personal observation of the author. It seems that the facts and the offence are given quick acknowledgement by the participants (although the offender will often deal with them directly, particularly in the form of apology and restitution). The focus is often on the problems the offender is experiencing, whether it be drug or alcohol problems, childhood abuse or neglect, lack of direction in life and so on. This focus is consistent with Judge Murray Sinclair, "Aboriginal Peoples, Justice and the Law" in Gosse, Henderson & Carter, eds., *supra* note 2, 173 at 182: "In Aboriginal cultures, the guilt of the accused would be secondary to the main issue. The issue that arises immediately upon an allegation of wrong-doing is that "something is wrong and it has to be fixed".

33. M. Poitras, *Alternative Dispute Resolution Sentencing Circles* (University of Saskatchewan, 1994) [unpublished] at 21.

34. The authority of the judge to make the decision on sentencing was confirmed in the majority judgment in *Morin* (C.A.), *supra* note 1, at 705:

Since there is no provision in the *Criminal Code* for the use of sentencing circles, it is implicit in their use, and recognized by all of the judgments mentioned above, that when sentencing circles are used, the power and duty to impose a fit sentence remains vested exclusively in the trial judge. If a sentencing circle is used, and it recommends a sentence which is not a fit sentence, the judge is duty bound to ignore the recommendation to the extent that it varies from what is a fit sentence.

35. James, *supra* note 14 at 1.

36. *Ibid.* at 11-13. The issue of confidentiality was also referred to by Stuart, J. in *Moses*, *supra* note 3 at 131:

The tradition of a circle-"what comes out in a circle, stays in a circle"-runs counter to the justice tradition requiring both an open court and transcripts. A more flexible set of rules for exceptions must be fashioned to establish a balance in merging First Nation, community, and justice system values in the circle.

In Saskatchewan, open court and transcripts seem to be the norm.

37. See Crnkovich, *supra* note 20 at 16:

There appears to be some confusion about Inuit-based justice initiatives and community-based justice initiatives. By virtue of Inuit being the majority within the community, does not necessarily make a community-based initiative an Inuit-based initiative. In fact, very few of the community-based initiatives are rooted in Inuit tradition. Adult diversion and circle sentencing are not Inuit traditions. In order for alternatives to be Inuit-based, Inuit must be allowed to design and implement them. Those within the justice system endorsing alternatives must be willing to allow their models to be reconstructed to reflect Inuit values and traditions.

38. Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System* (Report of the National Round Table on Aboriginal Justice Issues, Ottawa: Canada Communication Group, 1993) at 434 [hereinafter RCAP Round Table]. RCAP, in its report, *Bridging the Cultural Divide-A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) [hereinafter RCAP: *Bridging*] at 209, concludes after examining the court room and the circle processes, that "the circle is a highly dynamic and flexible approach." However, at 210: "it is a reflection of diversity that some Aboriginal nations and communities will not adopt the circle as the most culturally appropriate process."

39. Green, *supra* note 4 at 30:

The traditional role of community circles in dispute resolution among the pre-contact Cree and Ojibway is difficult to assess. Given the limited size of nomadic hunting communities and the non-interventionist traditions of pre-contact woodlands tribes, it appears doubtful that community circles, similar in format and size to the sentencing circles currently being conducted, were used to facilitate dispute resolution. However, evidence does exist of community consultation following a transgression within traditional Cree and Ojibway society. Usage of circles appears to be accepted as having

traditional significance by present day Cree and Ojibway people.

40. In the sentencing circle held in *Campbell*, *supra* note 7, some circle participants didn't like the term, and did not wish to be part of a sentencing process:

Janice Acoose told the "circle" that she was uncomfortable with the term "sentencing circle". The spiritual leader explains that he too is uncomfortable with the term as traditionally sentencing was not part of Aboriginal justice systems. He states that a circle was held when the matters to be discussed pertained to the community and they assisted the community with dispute resolutions. Judge Seniuk suggests that perhaps this hearing could be called "pre-sentence input".

Rosemary Scherman, *Alternative Aboriginal Sentencing* (University of Saskatchewan, 1995) [unpublished] at 9.

41. The judge has the discretion under s.735(1) of the *Criminal Code*, *supra* note 19, to order that a pre-sentence report be prepared by a probation officer to provide information about the offender and to assist in determining an appropriate sentence. A judge can also consider a victim impact statement pursuant to s.735(1.1).

42. *Taylor*, *supra* note 9 at 33.

43. In *R. v. Joseyounen*, [1995] 6 W.W.R. 438, at 446 (Sask. Prov. Ct.), Judge Fafard used the 'sentencing circle' not as a sentencing process, but as a community healing initiative for the offender:

It will not be a sentencing circle as such, because there is a threshold sentence in this case from which I cannot and should not depart. As a healing circle it will serve a useful purpose and perhaps the circle will be able to make suggestions for parole conditions that the Parole Board would wish to consider if the accused makes an application for parole.

44. *Morin* (C.A.), *supra* note 1 at 725-6, 734-6.

45. *Ibid.* at 708.

46. *Ibid.* at 729.

47. *Joseyounen*, *supra* note 43 at 442-5. In *Taylor*, *supra* note 9, Chief Justice Bayda dealt with the seventh criterion in response to the Crown's submission that this was not a case for taking the "calculated risk". He concluded at 23 that this criterion should not be rigidly applied.

48. Christie Jefferson, *Conquest By Law* (Supply and Services Canada: Aboriginal Peoples Collection, Corrections Branch, Solicitor General, 1978, published 1994) at 21 (in discussing the Ojibway):

Personal disgrace, and its reflection on the shamed person's family, were effective tools in the hands of the chiefs and councils in controlling unruly and offensive behaviour (endnote omitted).

49. RCAP: *Bridging*, *supra* note 38 at 21-2 (quoting from the Cawsey Task Force, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its impact on the Indian and Metis People of Alberta*).

50. See generally, John Braithwaite, *Crime, shame and reintegration* (Cambridge: Cambridge University Press, 1989).

51. Carol La Prairie, "Aboriginal crime and justice: Explaining the present, exploring the future" (1992) 34 *Can. J. Crim.* 281 at 284. See the article generally for her discussion of these concepts and Braithwaite's theory of reintegrative shaming (*supra* note 50).

52. *Moses*, *supra* note 3 at 127-8.

53. Rupert Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" in Robert A. Silverman and Marianne O. Nielsen, eds., *Aboriginal Peoples and Canadian Criminal Justice* (Toronto: Harcourt Brace & Company, 1992) 145 at 151 [hereinafter "White Eyes"].

54. *Ibid.* at 153.

55. See the examples in James Dumont, "Justice and Aboriginal People" RCAP Round Table *supra* note 38 at 83:

traditional Aboriginal responses to the law, such as, regular teaching of community values by elders and other respected persons in the community; warning and counselling of particular offenders by leaders or by councils representing the community as a whole; using ridicule or ostracism by the community at large to shame offenders and denounce particular wrongs; mediation and negotiations by elders, community members clan leaders, aimed at resolving particular disputes and reconciling offenders with the victims of the misconduct; payment of compensation by the offenders (or their clan) to their victims or victim's kin; and so on, can take a meaningful and useful place within such a system. In the present justice system these approaches tend to be culturally incompatible, being guided by such expectations as obedience to superior state authority; retributive punishment; authoritative judgement; institutional confinement; incarceration as

protection and deterrence, etc.

56. *Moses*, *supra* note 3, at 118. See also RCAP: Bridging, *supra* note 38 at 2 for the effect of the existing process:

non-Aboriginal Canadians have come to think of the administration of justice as a highly specialized and professionalized aspect of society...In many cases the specialized language that accompanies professional training and the labyrinthine organization that have become the hallmarks of modern bureaucracy are difficult to penetrate by those outside the system.

57. *Morin* (C.A.), *supra* note 1, at 708.

58. *Moses*, *supra* note 3 at 123.

59. *Ibid.* And at 124:

The physical proximity of all participants, the ability to see the face of the person speaking, the conversational tone, the absence of incomprehensible rituals, and the intermingling of professionals and lay members of the community during breaks, all a consequence of the circle, broke down many barriers to participation.

60. *Ibid.* at 128.

61. *Ibid.* at 129.

62. RCAP: *Bridging*, *supra* note 38 at 123.

63. S. 718.(f) *Criminal Code* *supra* note 19.

64. *Morin* (C.A.), *supra* note 1 at 700, majority decision of Sherstobitoff J.A.: "There is no contest over the use of sentencing circles; their use in this Province is now well established." And at 727, dissenting judgment of Chief Justice Bayda: "There is no doubt that the sentencing circle is now a part of the fabric of our system of criminal justice and is a recognized and accepted procedure."

65. *Ibid.* at 704.

66. *R. v. Cheekineew*, [1993] 3 C.N.L.R. 172 (Sask. Q.B.) 177.

67. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice Equality, Respect and the Search for Justice*, Minister's Reference, Report 34 (Ottawa: Law Reform Commission of Canada, 1991), at 17 [hereinafter Law Reform Commission].

68. RCAP Round Table, *supra* note 38 at 11.

69. Law Reform Commission, *supra* note 67 at 17 (taken from a document tabled in the Ontario Legislature).

70. Leonard (Tony) Mandamin, "Aboriginal Justice Systems: Relationships", RCAP Round Table, *supra* note 38, 275 at 279.

71. *Corrections and Conditional Release Act*, S.C. 1992, c-20, s.79 as noted in *Increasing Métis Involvement in Corrections* (Correctional Services of Canada, Prince Albert: The Care and Custody of Aboriginal Offenders Conference, 15-7 Feb. 1995) at 9.

The scope of the definition of 'Aboriginal community' in the corrections area is significant:

While the terms First Nations, tribal Council and Band are well settled concepts, the terms "community organization" and "other groups with a predominantly Aboriginal leadership" are less certain. However, a literal translation of these would undoubtedly enable Métis and off-reserve Indian local, regional and national organizations to get involved, friendship centres, Aboriginal women's organizations and Aboriginal controlled service delivery organizations.

*Legal Framework For Aboriginal Correctional Initiatives* (Correctional Services of Canada, Prince Albert: The Care and Custody of Aboriginal Offenders Conference, 15-7 Feb. 1995) at 16.

72. See, for example, the concerns of Noble Shanks, "Parallel Justice System for Aboriginal People" (Saskatoon: Canadian Bar Association, Saskatchewan Branch, Mid-Winter Meeting, 2-4 Feb. 1995, Volume 1) at 6:

the persons chosen to compose a sentencing circle may not be in touch with the sub-culture of young people in the community who are involved in the type of activities which would tend to lead to their appearance before a sentencing circle. In such cases so-called community leaders may appear to the general younger population as co-opted by the system and therefore their employment in the sentencing process may do nothing to remove their sense of alienation from the process. On the contrary, the use of community people in the sentencing process may cause additional disputes and aggression within the community if they are considered to be biased or part of the system, or one particular family group in the community.

73. *Joseyounen*, *supra* note 43 at 443 (one of the criteria for holding a sentencing circle):

That there are elders or respected non-political community leaders willing to participate.

I am of the firm view that political non-intervention must become a cornerstone of the circles from the very outset, so that any attempt to contravene that principle is immediately and automatically challenged by others in the circle.

74. *Cheekinew*, *supra* note 66 at 175.

75. *Morin (C.A.)*, *supra* note 1 at 727-9.

76. *Campbell*, *supra* note 7.

77. P. A. Monture-OKanee and M. E. Turpel, "Aboriginal Peoples and Canadian Law: Rethinking Justice" (1992) *U.B.C.L. Rev.* Special Edition 239 at 266: "Many citizens of our nations are striving to be integrated into aboriginal societies for the first time. This desire must be recognized and supported."

78. *Taylor*, *supra* note 9 at 27.

79. *Ibid.* at 28.

80. *Ibid.* at 31.

81. See Crnkovich, *supra* note 20 at 14-17 for a discussion of a sentencing circle in which a lack of readiness was very apparent and seemed to result in a poor experience. Among the recommendations and observations of Crnkovich regarding Inuit communities were that cases heard by a circle need to be more carefully selected by both the judge and the community. Similarly, the organization of the circle should be done by both the judge and the community. The selection of the participants should be viewed as very important and should have guidelines (particularly in violence cases where there should be an equal number of supporters for both the victim and the offender). Victims in sexual and spousal assault cases should be well represented in a circle and must be protected from the offender if he remains in the community. Crnkovich stated that the objectives of alternative sentencing and circles must be understood by the circle participants, as must the discriminatory nature of Inuit traditions against women. It is very important that power is not merely transferred from the court to a select group within the community.

82. Correctional Services of Canada, "Aboriginal Self-Government and Corrections" (Prince Albert: The Care and Custody of Aboriginal Offenders Conference, 15-7 Feb. 1995) at 4-5, noted that the reintegration of Aboriginal offenders into their home communities after incarceration in federal institutions was



very unsuccessful. Among the reasons were:

- a) the community did not want the offender to return because it did not have the facilities or desire to continue services to the offender after incarceration;
- b) some Inuit communities wanted offenders to spend the full length of their sentence elsewhere;
- c) depressed socio-economic conditions did not give rise to effective re-integration.

83. Martha Flaherty, Address (Prince Albert: The Care and Custody of Aboriginal Offenders Conference, Correctional Services Canada, 15-7 Feb. 1995) [unpublished]. She spoke as a representative of the Inuit women's association, Pauktuutit, and stated that any transfer of responsibilities to a community without adequate funding amounts to dumping the matter on the community, and that the pace of the transfers must slow down to allow for the development of adequate guidelines and standards. Similarly, Sue Heron-Herbert, Address (Prince Albert: The Care and Custody of Aboriginal Offenders Conference, Correctional Services Canada, 15-7 Feb. 1995) [unpublished] who is the Director Community Justice, NWT, stated that community justice initiatives must come from the community and must not be imposed by the government. If the initiative is community-based and is owned by the community, it will be self-correcting. She stated that the most successful communities are those which do not receive government funding. She told of one community which held a sentencing circle and the judge reduced the recommended sentence. The community refused to sit with the judge after that incident. She advised justice officials to let communities make decisions for themselves and set their own standards when a sentencing circle is used.

84. *Morin supra* note 1 at 728.

85. RCAP: Bridging, *supra* note 38 at 169-72. It also noted at 171 :

The notion of seeking community input and control is a frightening one to some people. A true consultative process could mean a loss of power and control for police, judges, lawyers, government officials and elected band councilors.

86. Pauktuutit, Inuit Women's Association, *Setting Standards First - Community-Based Justice and Correctional Services in Inuit Communities* (Prince Albert: The Care and Custody of Aboriginal Offenders Conference, Correctional Services Canada, 15-7 Feb. 1995) at 4 [hereinafter *Setting Standards*].

87. Green, *supra* note 4 at 46:

Judge Bria Huculak, previously of La Ronge, stated unequivocally that circle sentencing development in northern Saskatchewan had been essentially "judge driven" (footnote omitted).

However, in Saskatchewan, the judges have been particularly careful about

ordering sentencing circles where the interests of victims might be compromised (see however *Taylor, supra* note 9 where the circle was held without the consent of the victim and the community).

88. *Setting Standards, supra* note 86 at 5. Pauktuutit cautions against accepting any change within the justice system as an improvement. It has criticized judges who, in an attempt to avoid or reduce incarceration, have imposed innovative sentences upon male sex and violence offenders. There are often few alternatives in community sentencing and innovations can result in short periods of incarceration, community service and other probation. Such sentences are seen as ineffective and lenient by many Inuit women. There is often little counselling available within the community for these offenders. Probation orders may not be enforced, and adequate supervision of offenders and protection for victims may not be available. For example see Crnkovich, *supra* note 20 where she criticizes the circle for these very reasons.

89. *Setting Standards, ibid.* at 6-7.

90. RCAP: *Bridging, supra* note 38 at 108, for a discussion of the South Island Tribal Council project and criticisms that women's (victims') concerns were not being properly considered.

91. *Ibid.* at 171.

92. *Setting Standards, supra* note 86 at 11-2.

93. Ross, "White Eyes" *supra* note 53 at 157.

94. *Joseyounen, supra* note 43 at 439.

95. See Leonard Mandamin, Dennis Callihoo, Albert Angus & Marion Buller, "The Criminal Code and Aboriginal People" *U.B.C. L. Rev.* *supra* note 77, 5 at 17 for an example of a Chief of a band who was put in conflict by being subpoenaed to testify against an offender for whom he had taken responsibility.

96. See RCAP: *Bridging, supra* note 38 at 119 for a brief comment on volunteer burn-out.

97. See Crnkovich, *supra* note 20 at 12-14 for her discussion of the lack of preparation of the wife (victim) for the sentencing circle and the question of whether she attended freely.

98. *Joseyounen, supra* note 43 at 439.

99. In *Morin* (Q.B.), *supra* note 1, the victim spoke but declined to make a recommendation on sentence. Her mother, however, spoke strongly in favour of a severe sentence for the offender.

100. *Campbell*, *supra* note 7.

101. *Taylor*, *supra* note 9 at 7.

102. *Ibid.* at 31.

103. *Ibid.*

104. *Ibid.* at 32.

105. *Morin* (C.A.), *supra* note 1 at 732.

106. Blaine Favel, "First Nations Perspective of the Split in Jurisdiction" in Gosse, Henderson & Carter, eds., *supra* note 2, 136 at 139.

107. *Moses*, *supra* note 3 at 143.

108. See Don Avison, "Clearing Space: Diversion Projects Sentencing Circles and Restorative Justice" in Gosse, Henderson & Carter, eds., *supra* note 2, 235 at 239:

I've seen prosecutors who claim to represent the "public interest" being told by people, in court, that they may represent a "public interest" but that it isn't necessarily the interest of the public that lives in Aboriginal communities. This has often been followed by an offer of tea and a willingness to talk further about what that elusive "public interest" might be.

109. This was the conclusion of the author in an address to the Canadian Bar Association, Saskatchewan Branch, Mid-Winter Meeting, 2-4 Feb. 1995, Saskatoon [unpublished] in speaking in criticism of the Crown appeal of the sentence in *R. v. Rope*, [1995] 2 C.N.L.R. 208 (Sask. Q.B.); [1995] 4 C.N.L.R. 98 (Sask. C.A.). See also Poitras, *supra* note 33 at 29 where she questions "how one appeals such a sentence since it is imposed by the very public which was to be protected."

110. *Taylor*, *supra* note 9 at 41.

111. The three Supreme Court of Canada cases dealing with the 'deferential' standard of review are *Shropshire, M.(C.A.)* and *McDonnell* (which are discussed in Chapter Two and cited at endnotes 31, 35 and 39 respectively). See also *R. v. Horvath* (Sask. C.A.) as discussed in Chapter Two at 49 and cited at endnote 42.

112. In Saskatchewan, most sentencing circles arise in the case of a guilty plea. Some people feel that a guilty plea is an essential requirement for an offender to qualify for a circle because it is seen as part of taking responsibility for one's actions. However, in *Taylor*, *supra* note 9, after a trial, the offender had been found guilty. Similarly, in *Moses*, *supra* note 3 the offender was found guilty after trials. For the view that circles should not be restricted to those who plead guilty, see James, *supra* note 14 at 38-9 where she argues that an accused has the right to a trial and may wish to pursue the right (perhaps for a collateral reason such as determining the legality of a police search). As well, an offender may have learned to accept responsibility after the trial process. The real issue, she argues, is resolving the criminal behaviour, not whether a trial occurred.

113. *Taylor*, *supra* note 9 at 24.

114. *Ibid.*

115. *Ibid.* at 25.

116. *Ibid.*

117. *Ibid.* at 26-7.

118. *Morin* (C.A.), *supra* note 1 at 705:

As a matter of principle, however, we should say that it would be futile, for the reasons given in both *Joseyounen* and *Cheekinew*, to use a sentencing circle in those cases where it is clear that the circumstances require, at a minimum, a penitentiary term.

*Cheekinew*, *supra* note 66 and *Joseyounen*, *supra* note 43.

119. *Morin* (C.A.), *supra* note 1 at 731.

120. *Joseyounen*, *supra* note 43 at 46.

121. *Taylor*, *supra* note 9 at 21.

122. *Ibid.*

123. *Ibid.* at 22-3

124. *Morin (C.A.)*, *supra* note 1 at 731-2.

125. *Moses*, *supra* note 3 at 133.

126. *Taylor*, *supra* note 9 at 27.

127. *Ibid.*

128. However, in the *Campbell* circle, *supra* note 7, the offender reoffended after the circle. He was given a further opportunity to rehabilitate, but again reoffended and was then incarcerated.

129. *Moses*, *supra* note 3 at 139.

130. *Cheekineew*, *supra* note 66 at 176-7.

131. *Taylor*, *supra* note 9 at 24-5.

132. James, *supra* note 14 at 42-3. See also *Morin (C.A.)*, *supra* note 1 at 717 where two of the probation conditions were: "b) He shall attend and participate in a drug program arranged for by the Saskatoon Metis Locals" and "c) He shall take clinical counselling as arranged for by the Saskatoon Metis Locals." Would the offender have been in breach of the order if the Locals did not arrange the drug program and clinical counselling?

133. The author observed the judge do this at the Kinisten sentencing circle, *supra* note 12.

134. The role of consensus was very important in Aboriginal societies. See Don McCaskill, "When Cultures Meet" in Silverman & Nielsen (eds.) *supra* note 53, 31 at 34 where he states in discussing the League of the Six Nations: "Like most Native political structures, its decision making was based on consensus rather than majority rule." According to Monture-OKanee, consensus does not mean total agreement. In Aboriginal traditions, there are three positions involved in reaching a consensus. The first is that all participants agree. The second is that a participant disagrees and is standing in the way of the decision of the rest of the group. The third is that a participant may disagree, but will not stand in the way of the decision being carried out. Monture-OKanee indicates that consensus decision-making does not result in the polarization of government. Rather, it allows people to voice their personal beliefs and not stand in the way of a decision. Patricia Monture-OKanee, Lecture (University of Saskatchewan, Saskatoon. 30 Jan. 1995) [unpublished].

135. This was observed by the author.

136. *Morin (C.A.)*, *supra* note 1 at 733-4.

137. *Ibid.* at 706.

138. *Ibid.* at 708-9. *Joseyounen supra* note 43 at 445.

139. *Morin (C.A.)*, *supra* note 1 at 714.

140. *Ibid.* at 730-1.

141. See Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders" in Gosse, Henderson & Carter, eds., *supra* note 2, 269 at 291 where he concluded that there is "no reason in principle why sentencing circles and community dispositions could not be attempted in non-Aboriginal communities." For the opposite view, that circles should be limited for the time being to Aboriginal peoples, see James, *supra* note 14 at 38.

142. *R. v. Bogdan*, 11 Sept. 1996 (Sask. Prov. Ct.).

143. Having sentencing circles available to all offenders is not unlike the family group conferences involving youth in New Zealand. Although the conference concept is based on Maori traditions, it is available to all offenders (in fact it is mandatory with only a few exceptions). This approach suggests that the issue of community is not that important. In the family group conference, the offender, victim, police and any appropriate family and community members are asked to attend. There is no requirement to show a connection to a specific group or community. The purpose is to meet with those who are most significant to the life of the offender (and victim). See generally, *Family Conferencing and Juvenile Justice – The Way Forward or Misplaced Optimism?*, Christine Alder and Joy Wundersitz, eds. (Australian Institute of Criminology, Canberra, ACT, 1994). See also *Bridging*, *supra* note 38 at 120-6 for a discussion of the Australian and New Zealand experience with family group conferences.

144. See Quigley, *supra* note 141 at 279:

As long, however, as emphasis is placed on avoiding disparity in sentencing, it will be extremely difficult for the present system to incorporate such developments as sentencing circles and alternative dispositions for offences where the starting point is a jail sentence. If jail is the mindset and we continue to assume that only jail can accomplish general deterrent and retributive aims, we will not embrace alternative dispositions or procedures that do not appear to us in our mindset to achieve those aims.

We see evidence of this problem in Saskatchewan with the appeals of sentencing circle decisions by Crown prosecutors. See also Patricia A. Monture-Okanee,

"Reclaiming Justice: Aboriginal Women and the Justice Initiatives in the 1990s", RCAP Round Table, *supra* note 38, 105 at 114-115 for her discussion of uniformity, formal equality and coercion.

145. See James *supra* note 14 at 41 for the same conclusion. See also Marcia Krawll, *Understanding the Role of Healing in Aboriginal Communities* (Supply and Services Canada: Aboriginal Peoples Collection, Corrections Branch, Solicitor General Canada, 1994) at 49:

Many participants offer the view that a community healing approach was actually "harsher" on offenders than was jail, in the sense of the pain and difficulty involved in admitting your guilt to your community. Being incarcerated may merely encourage the offender to externalize feeling and concentrate on the unfairness of the correctional system

146. *Moses*, *supra* note 3 at 125.

147. Jeremy Webber, "Individuality, Equality and Difference: Justification for a Parallel System of Aboriginal Justice", RCAP Round Table, *supra* note 38, 133 at 150-1. He argues that identical treatment of Aboriginal and non-Aboriginal offenders would create inequality because the former are subject to harsher systemic treatment than non-Aboriginal offenders.

148. Don Worme, "First Nations Perspective on Self-Government" in Gosse, Henderson & Carter, eds., *supra* note 2, 77 at 79.

149. H. Archibald Kaiser, "The Criminal Code of Canada: A Review Based on the Minister's Reference" *U.B.C. L. Rev.* *supra* note 77, 41 at 49.

150. Roderick A. Macdonald, "Recognizing and Legitimizing Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" RCAP Round Table, *supra* note 38, 232 at 242-3.

151. *Morin* (C.A.), *supra* note 1 at 705-09.

152. *Ibid.* at 708.

153. *Ibid.* at 730-1.

154. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

155. Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, Volume I, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991) 334 where the conflict between the Charter and customary law is discussed:

the Charter in paragraph 11(c) guarantees that an alleged offender is not a compellable witness in proceedings against himself or herself. This may conflict with some traditional laws that expect people to answer the complaints that have been lodged against them as part of the process of finding the truth and of healing the conflict within the community. Upholding the Charter principle of protecting the individual's rights could well be seen as violating the more accepted and long-standing primary law of that nation.

In response to this issue, the AJI recommended at 336 that: "First Nation governments draft a charter of rights and freedoms which reflects Aboriginal customs and values."

156. Law Reform Commission, *supra* note 67 at 21.

157. Heino Lilles and Barry Stuart, "The Role of the Community in Sentencing" *Justice Report* Vol. 8 No. 4 Spring 1992 at 5. They argue that sentencing circles can be accommodated within the existing justice system and that individual rights can be protected without restricting the involvement of the community.

158. At the sentencing stage, there is an undefined, reduced level of the offender's right to remain silent: *R. v. Jones* (1994), 30 C.R. (4<sup>th</sup>) 1 (S.C.C.) 25-6: The sentencing stage places a stronger emphasis on societal interests and more narrowly defines the procedural protection accorded to the offender...That is not to say that no protection is afforded to the offender at the sentencing stage.

159. Sentencing circles usually take at least a couple of hours. Some may run for extended periods of time (*Morin* took all day). Some circles are adjourned to allow the circle and/or the offender to put a plan into place or acquire more information.

160. Rupert Ross, "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing" in Gosse, Henderson & Carter, eds. *supra* note 2 at 247 at 252.

161. *Ibid.* at 263.



## **CHAPTER FOUR**

### **SENTENCING CIRCLES: REFORM OR A BRIDGE TO ABORIGINAL JUSTICE SYSTEMS?**

#### **4.1 INTRODUCTION**

The use of sentencing circles in Saskatchewan has raised many issues and has forced an examination of the effectiveness of sentencing practices. It has given the judiciary an opportunity to explore new directions in sentencing. The Court of Appeal decisions in sentencing circle cases and the three recent Supreme Court of Canada cases have resulted in different considerations being applied to the principles of sentencing, the standard of appellate review and the discretion of the sentencing judge.<sup>1</sup> Sentencing circles have also given momentum to the restorative justice movement and to other innovations such as family group conferencing.

Sentencing circles have a very brief history. This makes an assessment of their effectiveness difficult.<sup>2</sup> However, we should be considering what they are attempting to accomplish and where they are leading the justice system. Are sentencing circles merely a reform within the existing justice system or are they a stepping stone to Aboriginal justice systems? Is the *raison d'être* of the sentencing circle to make the existing justice system more responsive to the needs of Aboriginal offenders? Or, if the use of a circle is recognition that the

justice system does not and cannot serve Aboriginal peoples, is the next step the creation of culturally appropriate and effective Aboriginal justice systems?

The purpose of this Chapter is to attempt to answer these questions and to examine the three approaches which are generally taken to justice initiatives. Justice initiatives may be viewed firstly as a reform of the existing justice system. Secondly, they may be a phase in the development of Aboriginal justice systems. Or, they may be a reform within the existing justice system while Aboriginal nations develop their own justice systems (the two-tiered or two-track approach).

An examination of these three approaches will help put the sentencing circle into perspective within the Saskatchewan justice framework. However, before we begin that examination we must look at the overall approach to justice reform in Canada.

## **4.2 JUSTICE REFORM**

The consideration of whether a sentencing circle is a reform within the existing justice system or a step towards parallel or independent justice systems must be seen in light of the change in justice policy in Canada in recent years.<sup>3</sup> This change is reflected in the recommendations of the Law Reform Commission of Canada in 1991 [hereinafter Law Reform Commission], the Manitoba Aboriginal Justice Inquiry in 1991 [hereinafter AJI], and most recently, the Royal Commission on Aboriginal Peoples in 1996 [hereinafter RCAP]. Each of these commissions recommended the establishment of Aboriginal justice systems. The

latter two dealt with Aboriginal justice systems within the context of the self-government movement.

Governments and bureaucracies have approached justice issues by attempting to reform the existing justice system. This has resulted in increased consultation with Aboriginal governments and communities regarding their needs and the implementation of local justice projects. There has also been an increase in the number of Aboriginal persons working within the system. However, the justice system and its underlying principles have not been changed. If the adversarial system is not suitable or effective for Aboriginal persons, it is unlikely to become so by having an Aboriginal lawyer, judge, police or corrections officer administer the existing rules and procedures.

Recently, however, there has been a change in direction in justice policy. McNamara suggests that there is "a more general trend in favour of the alignment of justice reform policy with Aboriginal self-government aspirations."<sup>4</sup> He argues that the direction of Aboriginal justice reform policy has shifted from reform within the system to the establishment of Aboriginal justice systems:

there can be little doubt that Aboriginal justice reform has recently entered a 'new phase'. Autonomy has emerged as the key theme of proposals designed to seriously address the current status of Aboriginal people in terms of contact with criminal justice. More specifically, calls for the establishment of comprehensive and independent justice systems in Aboriginal communities have become the primary solution to a problem which has been widely observed since the late 1960s but ineffectively treated.<sup>5</sup>

However, if this is in fact the new political agenda, one wonders why the Saskatchewan Department of Justice is appealing sentences handed down by

judges who have held sentencing circles. It would seem that if justice reform is heading towards Aboriginal justice systems, the theory is ahead of its practical application within the criminal justice system. MacNamara recognizes this problem:

While there is strong evidence to support the statement that the establishment of Aboriginal justice systems is rapidly becoming the key solution of criminal justice reform policy in Canada, it is clear that there is still considerable opposition to this direction, and a number of key issues that need to be resolved.<sup>6</sup>

One of the key stumbling blocks to the implementation of Aboriginal justice systems is the public perception that equality before the law is paramount.

Webber states:

Although some have endorsed the creation of parallel systems of Aboriginal justice, non-Aboriginal political leaders-and, it seems, non-Aboriginal Canadians generally - have tended to balk at those proposals. Non-Aboriginal Canadians appear willing to consider reforms within a common institutional structure, but to oppose solutions that involve separation.

This opposition is rooted in a deep commitment to equality before the law and to individual freedom, and an entrenched suspicion of any distinctions based on cultural or racial difference, especially in the administration of justice. The criminal law is concerned with individual responsibility, and criminal sanctions should be structured (so the argument runs) so that they apply equally to all Canadians, fully respecting the autonomy of the individual. Cultural distinctions, it is said, undermine this commitment, subjecting Canadians to different penalties and different standards of conduct, perhaps even subordinating the individual to some vague sense of the collective interest. For many Canadians, the creation of separate systems of justice would be tantamount to apartheid, profoundly dividing Canadian society and entrenching inequality. Many non-Aboriginal Canadians simply cannot see how cultural difference can justify a separate system of criminal law without radically undermining freedom and equality.<sup>7</sup>

Reform of the justice system appears to be in a state of confusion. Change

within the existing justice system is apparent and is continuing but seemingly without acknowledgement of any specific direction. When a judge grants a request for a sentencing circle, it is unlikely that he or she is considering Aboriginal self-government or Aboriginal justice systems. The sentencing circle is seen as a more effective way to deal with a specific offender. The broader, political issues are not being considered by the justice system (although perhaps they are by some Aboriginal communities). It is likely that the sentencing circle is viewed by the participants of a sentencing circle as an immediate way to deal with certain offenders rather than as a justice reform leading to Aboriginal justice systems or self-government.

#### **4.3 SELF-GOVERNMENT AND SENTENCING CIRCLES**

The establishment of Aboriginal justice systems and specific justice projects such as sentencing circles must be examined in the context of Aboriginal aspirations for self-government.<sup>8</sup> Self-government, justice reform and Aboriginal justice systems are all linked:

There can be no doubt today that self-government is now the overriding issue for Aboriginal peoples. Criminal justice has a particularly strong association with self-government, because it implies the legitimate exercise of coercive power, which is the most visible sign of political autonomy. Indeed, in many political traditions, the State is defined precisely by its monopoly on the legal exercise of force (policing). Hence, the issue of self-government is inescapable when addressing the problems of criminal justice.<sup>9</sup>

Among the goals of Aboriginal peoples are: restoring the role of the community in the justice system; developing a justice system that is culturally

meaningful to their people; and solving the underlying problems leading to crime. The use of sentencing circles has mobilized Aboriginal communities and local justice committees to work towards these goals.<sup>10</sup> The concept of communities taking responsibility for the conduct of their members fits well into the self-government movement. Community development through the implementation of innovations such as sentencing circles may help alleviate many of the social, economic and justice problems of Aboriginal peoples.<sup>11</sup> RCAP recognized this:

The growing experience with sentencing circles also illustrates how models of decision making can be developed that empower communities in the search for constructive responses to individuals and families whose lives are the source of pain for themselves and harm to others.<sup>12</sup>

The government of Saskatchewan has endorsed the concept of Aboriginal self-government. Premier Roy Romanow stated in 1993:

During the course of the Charlottetown negotiations, we conceded, we admitted and we promoted the principle of the inherent right to Aboriginal self-government. We believed in it then, we believe in it tonight and we shall believe in it tomorrow. Of course, we are a long way from realizing this goal, especially with the collapse of Charlottetown: but we in Saskatchewan have decided not to walk away from the collapse of Charlottetown. We have taken some initial steps by establishing formalized structures in our province with the chief of the Federation of Saskatchewan Indian Nations, Roland Crowe, and with the president of the Métis Society of Saskatchewan, Gerald Morin.<sup>13</sup>

The Federation of Saskatchewan Indian Nations [hereinafter FSIN] acknowledges the relationship between Aboriginal justice systems and self-government:

Indian people must achieve self-government, which will allow us to create, develop and implement programs designed to meet our

unique and diverse needs. A critical element of Indian self-government is the control of our own Justice System which is one step in the evolutionary process towards self-government.<sup>14</sup>

The right to self-government, including the right to establish, maintain, and enforce justice systems in both civil and criminal law, including traditional laws, was recognized by AJI as a cornerstone of its recommendations. AJI argued that this would recognize a right that existed prior to European contact and suggested that the Canadian people should be able to accept this. It argued that Aboriginal self-government is not a threat: "Aboriginal people are simply saying, "Let us run our own affairs, in our own communities, in our own way."<sup>15</sup>

RCAP has similarly recognized the right to self-government and further, that the right to self-government exists equally for Indian, Métis, and Inuit peoples.<sup>16</sup> It recommended that

federal, provincial and territorial governments recognize the right of Aboriginal nations to establish and administer their own systems of justice pursuant to their inherent right of self-government, including the power to make laws, within the Aboriginal nation's territory.<sup>17</sup>

It is apparent, then, that sentencing circles and justice reforms have greater implications than merely 'fixing' the existing system. A consideration of Aboriginal self-government and Aboriginal justice systems have to be included in a broader view of defining sentencing circles in terms of reform or of a developmental stage in the creation of new justice systems.

#### **4.4 SENTENCING CIRCLES AS A REFORM WITHIN THE EXISTING JUSTICE SYSTEM**

It is often assumed that there is sufficient flexibility within the existing justice system to accommodate the needs and cultural differences of Aboriginal peoples. This assumption is premised on the notion that the needs of Aboriginal peoples will be met if the justice system can be understood by them, if there are more Aboriginal peoples working within the court, penal and administrative structures, and if cultural adaptations are made. Reform of the existing justice system involves making improvements and accommodations.<sup>18</sup> A primary focus of change within this context is to increase the number of Aboriginal personnel. Training and hiring Aboriginal lawyers, judges, police, and corrections, parole, and probation officers is meant to make the existing justice system a friendlier environment for Aboriginal offenders.<sup>19</sup> In conjunction with this approach is the implementation of cross-cultural training for non-Aboriginal personnel to develop sensitivity to Aboriginal cultures. Reform within the existing system also focuses on accommodation to cultural diversity through implementation of various community justice projects (such as sentencing circles, Elder panels and diversion projects).<sup>20</sup>

The underlying assumption of reforming the existing justice system is that the system can be made to work for Aboriginal peoples.<sup>21</sup> However, Chief Ovide Mercredi (in his capacity of Grand Chief of the Assembly of First Nations) advised the Law Reform Commission that the existing system could not be improved by



increasing Aboriginal participation:

Our experiences are such that, if you make (the justice system) more representative, it's still your law that would apply, it would still be your police forces that would enforce the laws, it would still be your courts that would interpret them, and it would still be your corrections system that houses the people that go through the court system. It would not be our language that is used in the system. It would not be our laws, It would not be our traditions, our customs or our values that decide what happens in the system.<sup>22</sup>

Reform (whether through 'Aboriginalizing' the system or accommodating special needs of Aboriginal offenders) does not change the principles of adversarial justice, guilt and innocence, punishment and individual rights which underlie the existing justice system.<sup>23</sup> The offender is still faced with the Euro-Canadian concept of the state proving guilt and punishing, rather than the Aboriginal concept of admitting responsibility and making things right.<sup>24</sup> It is still a conflict between two different approaches to justice.

Clearly, the sentencing circle is a reform within the existing justice system. It involves the same justice system, procedures and Euro-Canadian values as the ordinary sentencing hearing. The circle participants and the judge are still bound by the existing limitations of the justice system, the sanctions allowed by the *Criminal Code*, and the sentencing guidelines of the Court of Appeal (although a departure from the usual sentence is normally expected). Although the victim and the community have input into the sentencing stage of the justice process, it is still the prosecutor, and not the community, who has determined the charges to be laid. It is only at the end of the existing process that the victim and community have become involved through the sentencing circle. The judge is still making the

final decision on sentencing. From this perspective, the impact of the sentencing circle is limited (although an effective sentencing plan can be significant to the offender and community).

Sentencing circles can be seen as a reform within, and of, the existing justice system. However, they also have broader implications.

#### **4.5 SENTENCING CIRCLES AS A BRIDGE TO ABORIGINAL JUSTICE SYSTEMS**

The second view of sentencing circles is that they may be part of the transition to Aboriginal justice systems.<sup>25</sup> There is increasing demand from Aboriginal governments and communities for the opportunity to design and control justice systems that reflect cultural perspectives and the needs of their people.<sup>26</sup> It is based partly on the premise that changes made within the existing justice system ('tinkering' with the system) will never get to the root of the problem.<sup>27</sup> It is also recognition that injustices resulting from the existing system can be dealt with by providing Aboriginal peoples with the opportunity and the support to develop appropriate and effective justice systems.

Aboriginal justice systems could be independent and/or parallel to the existing justice system. Parallel justice systems would likely retain much of the existing Euro-Canadian features such as similar court, judicial and corrections structures and would be linked in some manner to the existing justice system.<sup>28</sup> However, the system would be under the control of the Aboriginal community or nation and have appropriate cultural modifications.<sup>29</sup>

An independent justice system would likely be quite different from the Canadian justice system and could be developed by an Aboriginal nation or community in whatever form was most suitable. It is unlikely that it could be completely independent of the Canadian justice system but likely would maintain some link to it.<sup>30</sup> It could involve the development of dispute resolution mechanisms peculiar to each community. It might have its own procedures and institutions reflecting traditional community decision-making. It could include the development of peacemaker courts, the use of Elder committees, the development of tribal court systems, or the revival of traditional institutions.

Webber believes that Aboriginal justice systems would have to have some kind of consistency with mainstream justice and that Canada federalism should accommodate them:<sup>31</sup>

The very existence of federalism is premised on the idea that variation in law from one part of the country to another is legitimate. This variation even affects the criminal law, though indirectly, through provincial control over policing, prosecution, the establishment of courts, some elements of the corrections system, and such other associated measures as youth protection. Those differences do not appear to have imperilled continued co-operation among Canadians...Given the degree of tolerance, the ideal of citizenship in Canada is surely flexible enough to allow parallel systems of Aboriginal justice. (footnote omitted)<sup>32</sup>

Aboriginal justice systems would be diverse and would differ from the existing justice system in varying degrees.<sup>33</sup> However, RCAP concluded that they would share: "principles of restorative justice, with reconciliation and healing assuming primary importance."<sup>34</sup> The Law Reform Commission acknowledged and supported the need for Aboriginal justice systems and acknowledged their

potential diversity:

We envisage Aboriginal communities opting for the creation of a variety of systems of justice, all of which may be described as Aboriginal justice systems. These may be located on a continuum stretching from approximations of the present system through various systems and processes incorporating distinctly Aboriginal features (such as alternative methods of dispute resolution and the use of Elders and peacekeepers) and ultimately on to a profoundly transformed system.<sup>35</sup>

The Law Reform Commission suggested that not all communities would want to establish their own justice systems. It further suggested that differences between Aboriginal and non-Aboriginal justice systems might not be as large as people may think and that Aboriginal justice systems could be accommodated within Canadian society. Unacceptable behaviour would likely be viewed similarly in both systems.<sup>36</sup>

In Saskatchewan, it is not acknowledged that sentencing circles may be playing a role as a bridge to Aboriginal justice systems. If this is where sentencing circles are heading, it is not intentional on the part of judges and justice officials. At this stage of their development, sentencing circles are regarded as an innovation in sentencing. However, as sentencing circles and other initiatives become more widely used and accepted, the barriers to Aboriginal justice systems are going to weaken.<sup>37</sup>

#### **4.6 AN APPROACH BLENDING REFORM AND ABORIGINAL JUSTICE SYSTEMS-THE TWO-TRACK OR TWO-TIERED APPROACH**

The 'two-track' or 'two-tiered' approach combines reform of the existing

justice system while taking steps towards the establishment of Aboriginal justice systems. This seems to be what is happening in Saskatchewan. This approach is intentional on the part of many Aboriginal groups and communities but it is not acknowledged by governments and the public. AJI endorsed this two-track approach. It recommended reforms to the existing court system, many of which should be regarded as "transitional steps to Aboriginal justice systems." It stated that the personnel hired to implement those steps

should be selected with the involvement of the communities in which they will be working, and with the anticipation of an Aboriginal system.<sup>38</sup>

The position of the FSIN is that the establishment of Aboriginal controlled justice systems is a first step to self-government.<sup>39</sup> It endorses a 'two-track' approach to justice. The first track is to develop and implement programs within the existing justice system (including sentencing circles). The second track is a long term, self-government approach which includes the development of Indian law, police services, and tribal court systems.<sup>40</sup> The FSIN stated:

It is important to remember that the long-term goal of Indian people is the control of our own Justice System. Reforms to the present system are only an interim measure and will do little to solve the social and economic problems confronting Indian people. We can only alter the inequities within the judicial arena by recognizing that Indian over-representation in the system is a symptom of a larger social and economic problem. This will require a deeper look into the social, economic and political framework that shapes the relationship between Indian people and the dominant society.<sup>41</sup>

RCAP has recognized the link between self-government and Aboriginal

justice systems:

Aboriginal peoples' right of self-government as an existing Aboriginal and treaty right within section 35 of the *Constitution Act, 1982* must encompass the jurisdiction to establish Aboriginal justice systems.<sup>42</sup>

RCAP recognized the 'two track' approach within the context of self-government:

Many of the submissions made to us referred to a two-track approach to reform - the first track being the reform of the non-Aboriginal system, the second the establishment of Aboriginal justice systems. As helpful as this may be in terms of identifying long-term and short-term changes, the necessary bridge between the two tracks must be understood clearly to be a new partnership, based on the foundation of Aboriginal self-government.<sup>43</sup>

It would seem that the 'two-track' approach may be the most descriptive of the situation in Saskatchewan.

#### **4.7 THE RECOMMENDATIONS OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES**

One of the major findings of RCAP is the same as that of AJI. It found that the existing justice system has failed Aboriginal peoples, principally because of the

fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.<sup>44</sup>

RCAP found that the relationships between Aboriginal and non-Aboriginal peoples as well as the relationship among Aboriginal peoples themselves had to be healed. The basis of a new relationship

between Aboriginal and non-Aboriginal people must be

recognition of Aboriginal peoples' inherent right of self-government. This right encompasses the authority to establish Aboriginal justice systems that reflect and respect Aboriginal concepts and processes of justice.<sup>45</sup>

RCAP stated that the right to establish criminal justice systems has to be exercised within Canadian federalism, that it is not an absolute right. It found that the right to establish justice systems is the right of each Aboriginal nation, not of individual communities (although communities can share in exercising the authority of its nation):

It will be for the people of each Aboriginal nation to determine the shape and form of their justice system and the allocation of responsibilities within the nation.<sup>46</sup>

It also concluded that in urban communities, the development of justice systems will be an important part of self-government which will require co-operation and co-ordination between the existing justice system and the new ones.<sup>47</sup> RCAP also made a number of recommendations regarding the implementation and operation of Aboriginal justice systems.<sup>48</sup> (However, the important matter is the very strong recommendations supporting the right and the need for Aboriginal justice systems).

It would be very surprising, given the history of ignoring the recommendations of various commissions and reports, if in fact anything concrete is accomplished in establishing Aboriginal justice systems in the near future. The barriers to implementation will be the lack of political will to act, the attitude of the non-Aboriginal public and the financial costs involved. In the meantime, the sentencing circle will be helping to pave the way for these changes (while at the

same time providing more effective sentencing practices).

#### **4.8 CONCLUSION**

Clearly, a sentencing circle is a reform of, and within, the existing justice system. It is also likely a bridge to Aboriginal justice systems.<sup>49</sup> It probably is one of the transition steps between reform of the existing justice system and the development of parallel or independent Aboriginal justice systems.<sup>50</sup> That is certainly the view and the goal of the FSIN. Similarly, RCAP concluded (when reviewing diversion projects) that:

As useful as they are in their own right, diversion and related initiatives are best seen as evolutionary steps toward the development of distinct Aboriginal justice systems.<sup>51</sup>

The same statement could be true of sentencing circles. The Law Reform Commission and AJI also advocate this two-track approach, suggesting that what can be fixed within the existing system should be fixed while the movement towards Aboriginal justice systems continues.

The perspectives and attitudes of the Canadian public will be key to developments in justice reform. The Law Reform Commission of Canada recognized that Aboriginal justice systems could be far less than perfect and "still respond to the needs of Aboriginal persons more effectively than the present justice system."<sup>52</sup> However, the non-Aboriginal public, justice personnel, and political figures seem to demand perfection of sentencing circles and other Aboriginal justice initiatives. This attitude slows progress and development of



projects and justice systems.

One very beneficial result of using sentencing circles in Saskatchewan is that it has provided the opportunity for non-Aboriginal justice personnel to learn about, appreciate, and learn *from* Aboriginal cultures and dispute resolution mechanisms. It has given Aboriginal and non-Aboriginal people an opportunity to work together. Judges, lawyers, enforcement officials, and members of different communities have had the opportunity to communicate and learn about different cultures and perspectives. The importance of this interaction cannot be understated. It can be seen as paving the way for more interaction and understanding, and for change.

Acknowledging and respecting cultural difference is an element of the process of change in the justice context. It is difficult, however, for the Canadian public to appreciate what cultural difference means and how it affects Aboriginal peoples within the justice system. The circle process may be providing the forum to explore different perspectives and to gain a greater understanding of new approaches to dispute resolution.

Aboriginal political leaders are clearly establishing the framework for independent systems and are following carefully planned agendas to meet their goals.<sup>53</sup> At the same time, justice officials are rushing to accommodate initiatives within the system, in efforts to maintain one justice system across Canada. The justice system, the public and Aboriginal groups are working at cross-purposes—each one heading a different direction without stopping to rationalize their efforts.

Governments and justice personnel would be well advised to promote and pursue justice initiatives *with* Aboriginal peoples and to acknowledge the direction of change. The sentencing circle is providing the opportunity in Saskatchewan to do both of these while also exploring new approaches to the sentencing of offenders.

## ENDNOTES

1. The Saskatchewan Court of Appeal cases of *R. v. Morin* and *R. v. Taylor* and the Supreme Court of Canada cases of *R. v. Shropshire*, *R. v. M.(C.A.)* and *R. v. McDonnell* have been discussed in detail in Chapters Two and Three. All cases are cited in the Endnotes in Chapter Three.
2. Ross Gordon Green, "Aboriginal Sentencing and Mediation Initiatives: The Sentencing Circle and Other Community Participation Models in Six Aboriginal Communities" (LL.M. Thesis, University of Manitoba, 1995) [unpublished], stated at 8 that it would be "premature" to draw conclusions about the impact of sentencing circles upon victims, offenders and community member. He also states at 8, (in footnote 6) that Judge Claude Fafard stated that it was too early to reach "any final conclusions about the impact of circle sentencing in Northern Saskatchewan." The Saskatchewan Department of Justice has recently undertaken a study of sentencing circles in Saskatchewan.
3. For a discussion of the various approaches to dealing with justice reform and an assessment of the changing policy direction towards Aboriginal justice systems and self-government, see Luke McNamara, "Aboriginal Peoples, The Administration of Justice And The Autonomy Agenda: An Assessment Of The Status Of Criminal Justice Reform In Canada With Reference To The Prairie Region" (LL.M. Thesis, University of Manitoba, 1992) [published as same title, Research Report, Legal Research Institute of the University of Manitoba]. This Thesis was written before the Royal Commission on Aboriginal Peoples released its findings.
4. *Ibid.* at 95.
5. *Ibid.* at 129.
6. *Ibid.* at 152. He also states at 152 that this opposition is demonstrated by the Manitoba government's position that Aboriginal justice systems cannot be established because of constitutional and *Charter* questions (despite the recommendations of AJI).
7. Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice", *Aboriginal Peoples and the Justice System*, Report of the National Round Table on Aboriginal Justice Issues

(Ottawa: Canada Communication Group, 1993) [hereinafter RCAP Round Table] 133 at 133-4.

8. See McNamara, *supra* note 3 at 15 and footnote 37 for the same conclusion. At 165:

the establishment of genuinely autonomous Aboriginal justice mechanisms is contingent on the prior constitutional recognition of the Aboriginal right of self-government, and an entrenched negotiation process that is capable of achieving a meaningful redistribution of a range of powers including jurisdiction over matters currently dealt with in terms of criminal law and justice administration.

However, the perspective of the FSIN is that the establishment of Aboriginal justice systems is a step towards self-government, rather than being contingent upon self-government.

9. Jean-Paul Brodeur, "Justice For The Cree: Policing and Alternative Dispute Resolution" (Grand Council of the Crees (Quebec), Cree Regional Authority, September 1991) at 8.

10. Mary Ellen Turpel concluded in "Reflections on Thinking Concretely About Criminal Justice Reform", in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) 206 at 215 that Aboriginal community workers are not looking for a

sudden break and some completely isolated regime. Community workers want lots of time for discussion, training...and a phased-in process of criminal justice reform implementation.

See also the submission to the Tribal Council Symposium (Saskatoon: 30-1 March 1994) by Teslin Tlingit Council:

The Clan leaders also sit as a sentencing panel with the Territorial Judge. *Since Clan leaders have played a role in the main stream justice there has been more awareness created about our traditional system.* (emphasis added).

11. However, the role of 'outsiders' in community development must be understood: Marcia B. Krawll, "Understanding the Role of Healing in Aboriginal Communities" (Aboriginal Peoples Collection, Corrections Branch, Solicitor General Canada, July 1994). At 55 she came to the following conclusion:

Outsiders to a community can play a useful role in the community development process, but for the outcome to be successful, the community must maintain control. The critical factors in promoting community development initiatives require that outside agencies or

interest groups support activities by:

- Assisting the community in moving in the direction that the community selects;
- Recognizing that a community must have the opportunity to fail as well as succeed;
- Giving preference to projects or approaches selected by the community;
- Understanding and respecting the rights, traditions, and desires of the community; and
- Assisting the community by awakening discontent, yet letting the community decide its own direction by guiding and not leading.

Contrast this approach with the role of the Crown prosecutors in appeals, and of a judge who might hold a sentencing circle in the absence of the support or consent of the community or who might over-rule the recommendations of the circle participants.

12. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide-A Report on Aboriginal people and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1966) [hereinafter RCAP: *Bridging*] at 215.

13. The Honourable Roy Romanow, "Provincial Perspective on Justice and Aboriginal Peoples" in Gosse, Henderson & Carter, eds., *supra* note 10, 32 at 33.

14. FSIN, "FSIN Justice Models" in Gosse, Henderson & Carter, eds., *supra* note 10, 321 at 321 [hereinafter "FSIN Models"].

15. Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, Volume I, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991) [hereinafter AJI] at 259.

16. RCAP: *Bridging*, *supra* note 12 at 54.

17. *Ibid.* at 224. At 248 RCAP states:

the power to make laws in the area of criminal justice belongs to the Aboriginal nation alone, not to its individual communities. The people of a nation may choose to allocate certain aspects of the criminal justice process to individual communities, but the right in its entirety can be exercised only at the level of the nation.

18. This approach is offensive to Patricia Monture-OKanee:

The more reading and the more listening I do, the more I notice how much this conversation about Aboriginal justice is becoming solely a conversation about the mainstream system accommodating us. I do

not want to be accommodated. It is truly an offensive suggestion. Offensive because in the long run I expect it will not make even a little bit of difference for the experiences my children will have. "Thinking About Aboriginal Justice: Myth and Revolution" in Gosse, Henderson & Carter, eds. *supra* note 10, 222 at 228.

19. See Paul Havemann, "The Indigenization of Social Control in Canada", *Aboriginal Peoples and Canadian Criminal Justice*, Robert A. Silverman and Marianne O. Nielsen, eds. (Toronto: Harcourt Brace & Company, 1992) 111 at 117 where he discusses indigenization and concludes that it continues domination and oppression by the colonizer:

Indigenization and the creation of semi-autonomous entities must be acknowledged for what they are--hybrids of the imposed system of social control which appropriate indigenous personnel to enhance legitimacy. Indigenization might constitute a potentially useful transition phase for criminal justice service delivery, especially if it began at both the most senior decision-making levels and among front-line staff. It must not become an end in itself.

This is an important perspective in evaluating sentencing circles.

20. McNamara, *supra* note 3 at 43 lists reform strategies within the existing justice system: cross-cultural training, employment of Native staff, community-based corrections programs, alternatives in sentencing, special assistance to Native offenders, more Native community involvement and advisory groups, recognition of Native culture and law, crime prevention and self-determination considerations.

However, as pointed out by Teresa Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter", RCAP Round Table, *supra* note 7, 359 at 373:

allowing Aboriginal people to administer their own oppression is not freedom from colonization; it is brown oppression. Taking courts and handing them over to brown patriarchs, or creating brown police forces is not Aboriginal justice. It is the involvement of Aboriginal people in their own colonization. Handing sentencing over to patriarchs with no concern for female victims of crime places the suppression of Aboriginal women closer to home; it does not end female oppression.

21. Judge David Arnot, "Diversion and Sentencing" in Gosse, Henderson & Carter, eds., *supra* note 10, 233 at 234 made this interesting observation about the two different approaches:

The Justice Advisory Council made it clear to the Aboriginal community in the Battlefords that we intend to work within the current justice system. We believe that criminal law and procedure

are liberal and flexible enough to accommodate the needs and concerns of the Aboriginal community. The Aboriginal community made it equally clear to us that they have an inherent right of self-government and that under that rubric there will be a separate justice system.

22. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) [hereinafter Law Reform Commission] at 13.

23. For a discussion of reforming the existing justice system, see McNamara, *supra* note 3, Chapter 2 "'Tinkering' with the Justice System: The Dominant Theme of Conventional Reform Strategies" at 42-72.

24. *Ibid.* at 45 where McNamara argues that 'tinkering' with the justice system as a means to reform does not "question the legitimacy of the existing system."

25. Samuel Stevens, "Northwest Territories Community Justice of the Peace Program", RCAP Round Table, *supra* note 7, 385 at 388, states that the community of Fort McPherson has established a justice committee and the community views the committee as "a first step toward self-government and a separate justice system." This could be the way sentencing circles are viewed in some communities.

26. The Federation of Saskatchewan Indian Nations (FSIN) held a conference entitled "Tribal Court Symposium", 30-1 March 1994, in Saskatoon. The objectives of the Symposium were to create awareness of the need for community based tribal justice systems; to promote the acceptance and understanding of their viability; to act to develop tribal justice systems; and to ensure that the FSIN is involved in the planning of tribal justice systems (found at 4-5 of the introduction to the Conference materials "It's Time For Action"). At 3:

The FSIN maintains that there is a fundamental need for change in the philosophy and practice of the current justice system. Steps must now be taken which will create the momentum for the ultimate goal of an Indian-controlled justice system.

The FSIN, at 6, acknowledged that the establishment of Indian-controlled justice systems is "an evolutionary process".

27. Blaine Favel, "First Nations Perspective of the Split in Jurisdiction" in Gosse, Henderson & Carter, eds., *supra* note 10, 136 at 140:

I say that the denial of our inherent right of self-government and the denial of our treaty rights to control dispute-resolution within our territories is unjust, and this injustice will not be ameliorated by

minor tinkering. It will not be ameliorated by placing more brown faces in the courtroom. The damage will only cease and healing can only occur when you allow us to assert jurisdiction within our communities over justice. We cannot change our position because we believe it is just and that your position, based on denial and dominance, is unjust.

The inadequacy of tinkering is also acknowledged by John H. Hylton (Human Justice and Public Policy Advisor, Government of Saskatchewan) in "Financing Aboriginal Justice Systems" in Gosse, Henderson & Carter, eds., *supra* note 10, 150 at 154-5:

Regrettably, tinkering with the system, whether through affirmative action programs or the other types of initiatives, has had very little impact on improving conditions for Aboriginal people. Nor have these programs fundamentally altered the nature of the relationship between non-Aboriginal service providers and their Aboriginal "clients". The real tragedy is that Aboriginal people continue to experience the same problems, and the programs of the dominant society continue to fail them.

28. There is much inconsistency in the use of the terms 'parallel' and 'independent' to describe Aboriginal justice systems. Although the author makes a distinction between the terms for descriptive purposes, note the comments of Noble Shanks, "Parallel Justice System For Aboriginal People" (Canadian Bar Association, Saskatchewan Branch, Mid-Winter Meeting, Saskatoon: 2-4 February 1995) Volume 1, page 1 of the paper:

The use of the "parallel justice system" terminology has been loosely applied in most of these discussions. It, on the one hand, appears to apply to notions of a constitutional and jurisdictionally separated system of laws and enforcement mechanisms regarding criminal conduct as it relates to aboriginal people. And on the other end of the spectrum, the terminology has been used to refer to notions of systems of application of the existing Canadian Justice System, which are uniquely developed to suit aboriginal communities, but are within the confines of existing constitutional jurisdictional arrangements.

29. Note however, that Mary Ellen Turpel, Address (Saskatoon: Tribal Justice Symposium, 30 March 1994) stated that Aboriginal justice systems are not about enforcing the Criminal Code. Rather, they are about the development and enforcement of tribal law. Part of the strategy to this end is correcting and improving the existing justice system while developing Aboriginal justice systems. She indicated that these things don't happen overnight and that there needs to be an active process of training. Criticism and the acceptance of criticism is going to



be important to this development. There needs to be a phased in approach and a combination of traditional and existing justice approaches. Aboriginal justice systems will not be ready to handle serious matters immediately.

30. See John Giokas, "Accommodating the Concerns of Aboriginal People Within the Existing Justice System", RCAP Round Table, *supra* note 7, 184 at 195:

it cannot be expected that parallel or separate systems will have no linkage with the existing system, even in their most developed forms. The starting point for their creation will be what now exists; they will of necessity evolve in stages from what now exists, and they will in all likelihood retain substantial links with what now exists because they will still be within Canada. In any event, even if a separate system were created tomorrow, it is highly unlikely Aboriginal communities would wish to take on the full range of *Criminal Code* matters, for example, even if such a thing were contemplated by government.

31. Webber, *supra* note 7 at 150-1.

32. *Ibid.* at 152.

33. See RCAP, *Bridging*, *supra* note 12 at 77-81 for discussion of Aboriginal justice systems. The FSIN acknowledged that it does not yet know what form "a First Nations controlled justice system for Saskatchewan" will take, and whether it will be separate or parallel: Dan Bellegarde, "The Position of the FSIN Justice Commission" in Gosse, Henderson & Carter, eds., *supra* note 10, 315 at 315.

34. RCAP: *Bridging*, *supra* note 12 at 214.

35. Law Reform Commission, *supra* note 22 at 3-4.

36. *Ibid.* at 19.

37. As an example, Ted Hughes of the Hughes Commission-Justice Reform Committee of British Columbia (1988) recommended that Aboriginal peoples should be accommodated in their customary ways and traditional values within the existing system and were to be encouraged to develop diversion programs where it was possible to do so. However, he stated in 1993 that he would not make the same recommendation today: "The Crown's Responsibility for Policing and Prosecution" in Gosse, Henderson & Carter, eds., *supra* note 10, 340 at 343.

38. AJI, *supra* note 15 at 339.

39. Bellegarde, *supra* note 33, 315 at 316.
40. *Ibid.* at 317-8.
41. "FSIN Models", *supra* note 14, 321 at 327.
42. RCAP: *Bridging*, *supra* note 12 at 77.
43. *Ibid.* at 78.
44. *Ibid.* at 309; AJI, *supra* note 15 at 21.
45. RCAP: *Bridging*, *supra* note 12 at 309-10.
46. *Ibid.* at 310.
47. *Ibid.* at 311.
48. *Ibid.* at 312-5.
49. However, Giokas, *supra* note 30 at 189-92 argues that a "false dichotomy" has been created as if the two tracks were mutually exclusive. See also Turpel, *supra* note 10 at 215:
- We spent several years in a distracting debate over whether justice reform involves separate justice systems or reforming the mainstream justice system. This is a false dichotomy and a fruitless distinction because it is not an either/or choice.
50. For the opposite conclusion, see James "Sta'miksi'na" Oka, "Criminal Systems of Justice in Canada: Toward Aboriginal Alternatives" (Prince Albert: Care and Control of Aboriginal Offenders Conference, Corrections Canada, 15-7 Feb. 1995). At 27 the author suggests that it is mistaken to equate increased Aboriginal responsibility over criminal justice administration in their communities as a movement towards establishing a separate or parallel system of justice for the Aboriginal peoples of Canada.
- He goes on to say at 31-2:
- Aboriginal justice alternatives generally and community-based justice initiatives specifically, are best understood as part of a process of empowering Aboriginal peoples with respect to the criminal system of justice in their communities and correspondingly disempowering the Canadian criminal justice system over

Aboriginal peoples...The movement towards Aboriginal justice alternatives and community-based justice initiatives are best understood in light of the broader movement towards Aboriginal self-government and self-determination.

51. RCAP: *Bridging*, *supra* note 12 at 109.

52. Law Reform Commission, *supra* note 22 at 23.

53. See for example "Spiritual Healing Lodge" (paper prepared on behalf of the Twelve First Nations Bands of the Prince Albert Grand Council) at 3:

The First Nations, through the Federation of Saskatchewan Indian Nations, are working toward the creation and development of a First Nations Justice System in Saskatchewan that includes alternative sentencing and corrections.

At 4, one of the guiding principles of the Spiritual Healing Lodge is "that First Nations Justice Systems are the cornerstone of Self Government and comprehensive community healing."

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